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No. ——— Orig.

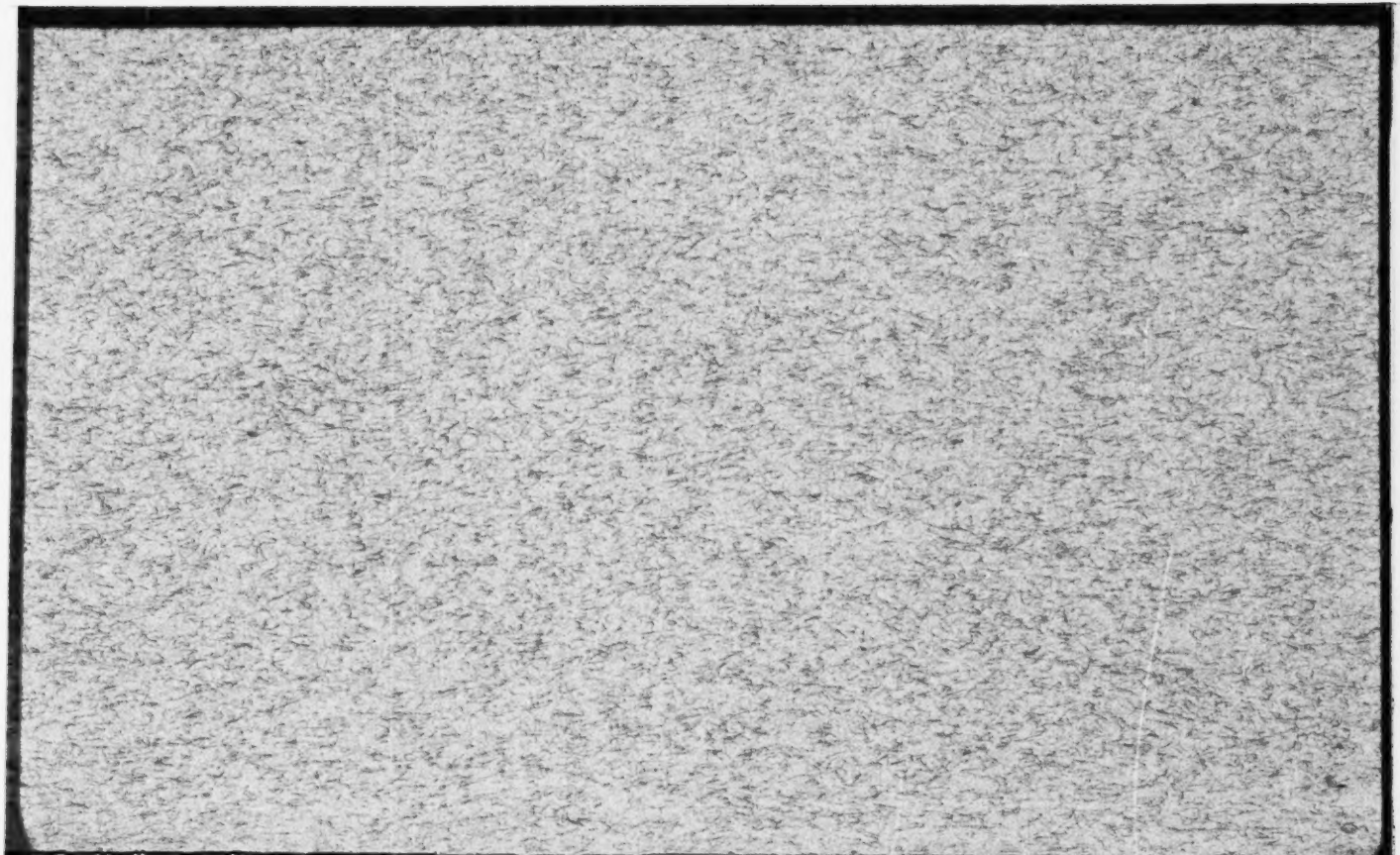
In the Supreme Court
of the United States
IN VACATION 1940

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF MISSOURI, *Respondent.*

Motion for Leave to File Complaint in the Supreme Court of the United States

JAY S. PARKER, Attorney General,
A. B. MITCHELL, Asst. Attorney General,
CLARENCE V. BECK, Emporia, Kan.,
ERRETT P. SCRIVNER, Kansas City, Kan.
Attorneys for Complainant.

18-4201



In the Supreme Court
of the United States
IN VACATION 1940

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF MISSOURI, *Respondent.*
No. ———

Motion for Leave to File Complaint in the Supreme Court of the United States

Comes now the complaintant, by Jay S. Parker, attorney general of the state of Kansas, and Clarence V. Beck, co-counsel, a member of the bar of the United States supreme court, and states that there is now existing a controversy between the state of Kansas and the state of Missouri, each of which is a sovereign state of these United States, involving the question of the true and proper boundary line between said states, and the question of the jurisdiction of each state government over and in relation to the territory and lands involved, as more particularly set out in complainant's petition hereto attached; that the supreme court of the United States has original and sole

jurisdiction in the premises, and that this suit is in equity.

Wherefore, movents respectfully pray this Honorable Court take original jurisdiction herein and grant the complainant leave to file its petition in this court, and further pray for such orders and process as to the court may seem proper.

JAY S. PARKER, Attorney General,
CLARENCE V. BECK,
Attorneys for Complainant.

STATE OF KANSAS, COUNTY OF SHAWNEE, SS:

Comes now Jay S. Parker, attorney general of the state of Kansas, who being sworn upon his oath does state that he is the attorney general of the state of Kansas, and as such is empowered and authorized to file the aforesaid motion, and to represent the state of Kansas in this cause. Also, comes Clarence V. Beck, who being sworn upon his oath states that he is co-counsel with Jay S. Parker, attorney general, in these proceedings; that he is a member of the bar and in good standing in the practice before the supreme court of the United States, and each of these affiants further state that the facts set forth in the foregoing motion are true to their best knowledge and belief.

JAY S. PARKER, Attorney General,
CLARENCE V. BECK, Co-Counsel.

Subscribed and sworn to before me this 13th day of May, A. D., 1940.

RAY M. KIMBALL, *Notary Public.*

My commission expires: January 4, 1943.

In the Supreme Court of the United States

THE STATE OF KANSAS, *Plaintiff*,

vs.

THE STATE OF MISSOURI, *Defendant*.

No. ———

BILL OF COMPLAINT

Comes now the state of Kansas, the plaintiff herein, with permission of this court first having been obtained, and files this bill of complaint against the defendant, the state of Missouri, and in support thereof alleges:

I

The plaintiff, the state of Kansas, was duly organized and admitted to the Union on the 29th day of January, 1861. The defendant, the state of Missouri, was duly organized and admitted to the Union on the 10th day of August, 1821.

II

At the time the state of Kansas was admitted to the Union, the Missouri river, as it then flowed, was established as the eastern boundary of Kansas and the western boundary of Missouri, from the intersection of said river

with the 40th parallel, southward to the mouth of the Kansas river.

III

That portion of the Missouri river which was established as the boundary line between the plaintiff and the defendant always has been and now is a meandering, fast-flowing stream, and the said river flows through rich, sandy soil. As a consequence thereof, the said river frequently has shifted its course, some of which shifting has been gradual and some of which shifting has been sudden; and at this time, the Missouri river does not follow the same course it did at the time it was established as a boundary between plaintiff and defendant. Such changes in the course of the Missouri river have given rise to controversies and disputes between plaintiff and defendant concerning the true boundary between them. The defendant, through its subdivisions, is assuming to exercise jurisdiction and control of certain lands within the boundary and territory of the plaintiff, contrary to the rights of the plaintiff and in defiance of the authority of this plaintiff.

IV

The United States government, through its Department of War, has control over the said Missouri river and has established numerous jetties and constructed numerous revetments along the course of said stream, and as a result thereof, the present channel or course of said Missouri river is now substantially stabilized.

V

In view of the above-mentioned disputes concerning the course or channel of said stream, action of this court is necessary to determine the true boundary in order that plaintiff and defendant accurately may determine the location of disputed lands and territory. This becomes necessary in order to determine the jurisdiction of plaintiff and defendant over persons and property located in said disputed territory, and particularly those areas hereinafter specifically set out.

VI

At points along the course of said stream between War Department Survey Stations 510 and 515, the same being where said stream flows between Doniphan county, Kansas, and Holt county, Missouri, the main current of the stream, by erosion, gradually ate into the lowlands along the left or Missouri side of said stream, and at the same time built up alluvions on the right or Kansas bank of said stream, so that by the year 1918, the river gradually had changed its course to the extent that the center of the stream had shifted several miles to the east, and several sections of land formerly located in Missouri had been deposited in the stream and lost to identification, and as a part of this same process, extensive alluvial deposits were built up on the right or Kansas side, which said process is known as accretion. Plaintiff is unable to state whether the alluvions were formed as an island or originally were

attached to the right or Kansas side of the stream, but in either event, they were wholly to the right of the center of the stream; that afterward and on or about February, 1918, an ice jam occurred downstream a short distance from Station 510, causing the said river suddenly to break through the alluvions aforementioned, and flow through some low chutes and form a new channel near the bluffs upon the right or Kansas side of said stream; that as a result thereof, approximately two thousand (2,000) acres of land susceptible of identification was separated from the right or Kansas bank of the stream and placed upon the left or Missouri side of the stream. This process is known as avulsion. Thereafter, for several years and until approximately 1927, the said Missouri river was divided in its flow and flowed upon each side of the alluvion so cut off by avulsion, as above described.

Thereafter, and during the year 1927, an ice jam occurred at approximately the same station and point as above described, and as a result thereof, the entire body of the stream of the said Missouri river flowed through the new channel formed by the avulsion of 1918. Since the year 1927, the former channel of said stream upon the left or Missouri side of said river gradually has filled up with deposits from said river, and the new channel cut through the accreted land in 1918 and 1927, as above described herein, became deeper and wider until the entire flow of

the stream now is along the new channel made by the first avulsion.

VII

The riparian owners of the land along the right, or Kansas bank, of said river between Stations 510 and 515 took possession of and occupied the alluvial lands as they accreted and were added to their respective holdings along the right, or Kansas bank, of said stream. The riparian owners along the right, or Kansas bank, of said stream continued to occupy said lands until about 1927 when the second avulsion occurred, at which time residents of the state of Missouri seized possession of said land and by force of arms drove the Kansas owners and occupants therefrom, and ever since said time, residents of the state of Missouri have occupied said lands against the will and over the protest of the Kansas owners thereof.

VIII

Prior to the year 1881, the Missouri river followed a meandering course through township 7, range 22, in Atchison county, Kansas. During the year 1881, a great flood occurred along and upon the Missouri river, and by reason thereof the course of the river at this point suddenly changed and shifted to the westward, leaving lands on the east thereof, susceptible of identification, all of which caused the lands in this paragraph above described to be located east of the present course of the Missouri

river, and leaving all of said above-described land within the boundary of the state of Kansas. The state of Kansas, through its political subdivisions, exercised domain and jurisdiction and control over the lands described in this paragraph without interruption or conflict, until the year 1930. Since 1930, the defendant, through its political subdivisions, has attempted to exercise control and domain over these portions of the land located to the eastward of the present flow of the Missouri river, although there has been no substantial change in the course of the river through the aforementioned township and range, subsequent to the year 1881. As a consequence of the dispute and controversy asserted in this paragraph, there is pending in the United States district court for the district of Kansas, an action entitled *E. T. Meyer v. Arnold D. Saunders,* Cause No. 4351, which action is being held in abeyance pending the conclusion and determination of the matters set out in this bill of complaint.

IX

At points along the course of the Missouri river between War Department Survey Stations 399 and 405, the same being where said stream flows between Leavenworth county, Kansas, and Platte county, Missouri, the main current of the stream, by erosion gradually ate into the lowlands along the left or Missouri side of said stream, and at the same time built up alluvions on the right or

Kansas bank of said stream, thereby adding to the land now commonly known as Delaware Island or Stigers Island. The tract of land to which said alluvial deposits accreted has been owned by the state of Kansas since statehood, and said tract, together with accretions thereto, have been occupied and used by the state of Kansas as a part of its prison farm. The defendant, through its political subdivisions, has assumed to exercise domain, jurisdiction and control over a part of the lands described in this paragraph, and has made, executed and delivered a deed thereto to a resident of the state of Missouri, who, by reason thereof, now wrongfully claims title and ownership thereto, which deed was recorded in November, 1939, at page 15 of deed record, volume 30, in the office of recorder for Platte county, Missouri.

X

The defendant, the state of Missouri, has taken possession of, claimed, assumed and taken jurisdiction over and has obtruded upon all of the land referred to in this complaint, contrary to the rights of this plaintiff; and as a result thereof, the plaintiff, the state of Kansas, wrongfully has been and is being ousted of her jurisdiction over said territory, and is obstructed from governing persons and property therein located.

XI

It is important and necessary that the true boundary between plaintiff and defendant be fixed and determined, for the following reasons:

1. That the disputed ownership of the lands may be determined.

2. That the power to tax the above-described lands be determined.

3. That all matters pertaining to the jurisdiction of persons and property may be fixed and determined.

WHEREFORE, Plaintiff prays that the common boundary between plaintiff and defendant be ascertained, established, determined and fixed, and that the rights of ownership, possession, jurisdiction and sovereignty to all the territory in controversy be restored to the plaintiff herein, and that title and right thereto be quieted in the plaintiff, and that the defendant, the state of Missouri, be ousted therefrom and be restrained and enjoined from disturbing the plaintiff and her subdivisions and peoples from the right to own, use and exercise full control over said territory, now wrongfully claimed or held by the defendant. Your plaintiff further prays that a subpoena be issued to the defendant, the state of Missouri, and that the defendant be required, at a date named, to answer this bill of complaint, and that the court appoint a commissioner to hear the evidence and report findings of fact to this

court, respecting the present true boundary between plaintiff and defendant, and that this plaintiff have such other and further relief as may be just and equitable.

JAY S. PARKER, Attorney General,
A. B. MITCHELL, Asst. Attorney General,
CLARENCE V. BECK, Emporia, Kan.,
ERRETT P. SCRIVNER, Kansas City, Kan.
Attorneys for Plaintiff.

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W. C. AUSTIN, STATE PRINTER
TOPEKA 1940
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No. 21 Orig.

IN THE

SUPREME COURT OF THE UNITED STATES

IN VACATION, 1940.

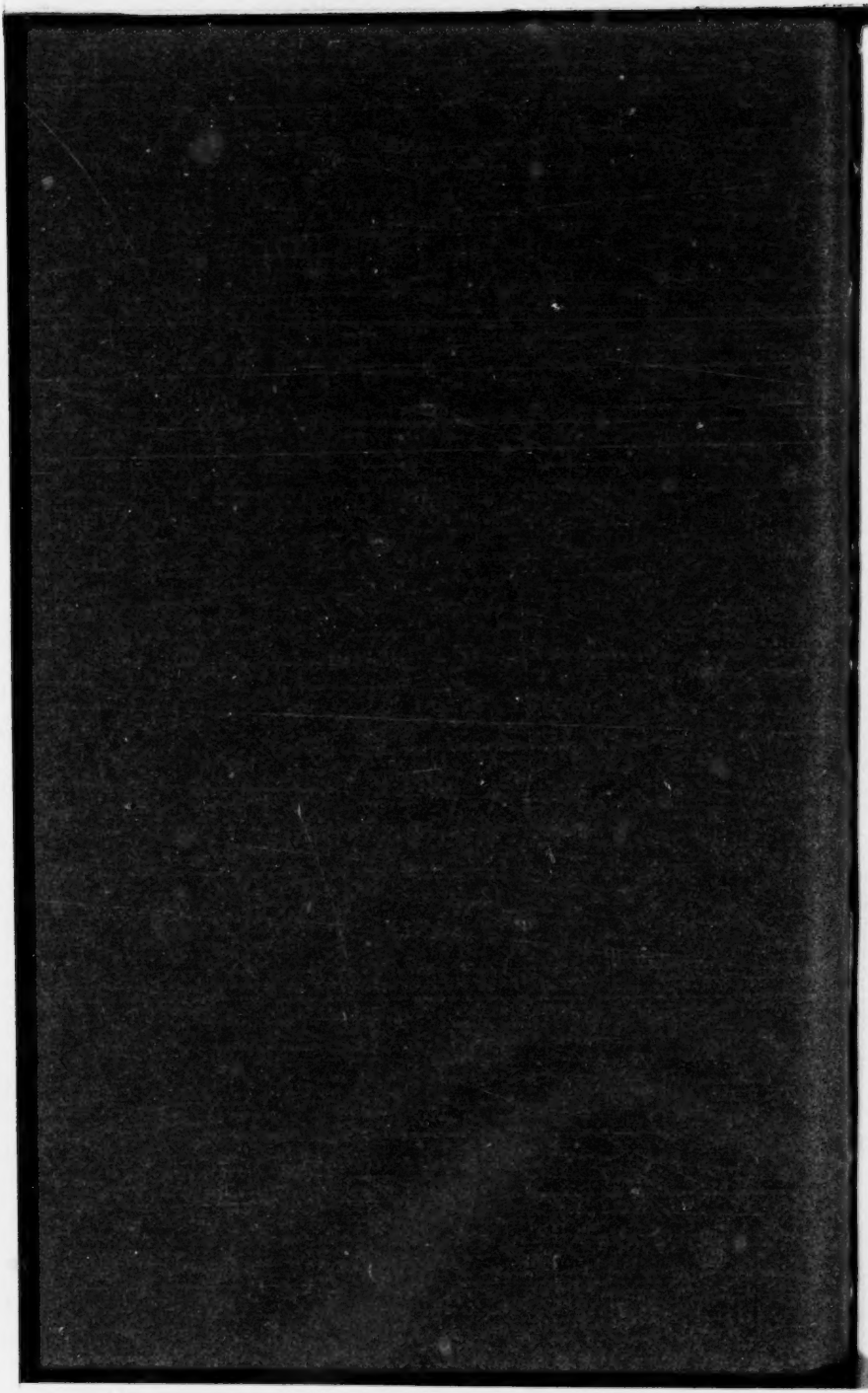
THE STATE OF KANSAS, *Complainant*,
vs.
THE STATE OF MISSOURI, *Respondent*.

RESPONDENTS' ANSWER TO COMPLAINT.

ROY McKITTRICK,
Attorney General,

TYRE W. BURTON,
Assistant Attorney General,

COVELL R. HEWITT,
Assistant Attorney General,
Attorneys for Respondent.



IN THE

SUPREME COURT OF THE UNITED STATES

IN VACATION, 1940.

THE STATE OF KANSAS, *Complainant*,
vs.
THE STATE OF MISSOURI, *Respondent*.

RESPONDENTS' ANSWER TO COMPLAINT.

Comes now Roy McKittrick, the duly elected and legally qualified and acting Attorney General of the State of Missouri, Respondent in the above entitled cause of action, and on behalf of said Respondent, and in answer to the Complainant's petition herein admits, denies, alleges and avers as follows:

I.

That the Complainant herein, the State of Kansas, was duly organized and admitted to the Union on the 29th day of January, 1861; that the Respondent, the State of Missouri, was duly organized and admitted to the Union on the 10th day of August, 1821.

II.

That at the time the State of Kansas was admitted to the Union, the Missouri river, as it then flowed, was established as the eastern boundary of Kansas and the western boundary of Missouri, from the intersection of said river with the 40th parallel, southward to the mouth of the Kansas river.

III.

That that portion of the Missouri river which was established as the boundary line between the Complainant and the Respondent herein always has been and now is a meandering, fast-flowing stream, and the said river flows through rich, sandy soil. As a consequence thereof, the said river frequently has shifted its course, some of which shifting has been gradual and some of which shifting has been sudden; and at this time, the Missouri river does not follow the same course it did at the time it was established as a boundary between the Complainant and Respondent; that such changes in the course of the Missouri river have given rise to controversies and disputes between Complainant and Respondent concerning the true boundary between them. The Respondent denies that it is assuming to exercise jurisdiction and control of certain lands within the boundary and territory of the Complainant, contrary to the rights of the Complainant and in defiance of the authority of this Complainant; that by virtue of the Constitution and Laws of Missouri now in force in said state, and by virtue of the provisions of the Acts of Congress of the United States and Treaties made pertaining to the lands here involved, the Respondent is entitled to the possession, jurisdiction and sovereignty over all the territory along the Missouri river which it is now claiming and exercising jurisdiction of and which is involved in Complainant's complaint.

IV.

That the United States Government, through its Department of War, has control over the said Missouri river and has established numerous jetties and constructed numerous revetments along the course of said stream, and as a result thereof, the present channel or course of said Missouri river is now substantially stabilized.

V.

Respondent admits that there are disputes concerning the course of the channel of said stream at the locations hereinafter mentioned and that the action of this court is necessary to determine the true boundary between Complainant and Respondent in order that they accurately may determine the

location of disputed lands and territory; that this becomes necessary in order to determine the jurisdiction of the Complainant and Respondent over persons and property located in said disputed territory, and particularly those areas hereinafter specifically set out.

VI.

Respondent further states that at points along the course of said Missouri river between War Department Survey Stations 510 and 515, the same being where said stream flows between Doniphan County, Kansas, and Holt County, Missouri, the said Missouri river, by erosion, gradually ate into the lowlands along the left, or Missouri side of said stream, and located in Townships 58 and 59 North, Range 38 West, Holt County, Missouri, but denies that it built up alluvions on the right or Kansas bank of said stream, and denies that by the year 1918, the said river had gradually changed its course to the extent that the center of the main channel of said stream had shifted several miles to the east, and denies that several sections of land formerly located in Missouri had been deposited in the stream and lost to identification, and as a part of this same process, extensive alluvial deposits were by accretion and/or island formation built upon the right, or Kansas side of the main channel of said stream. Respondent, further answering, denies that the alluvions were formed as an island or originally were attached to the right, or Kansas side of the stream, and alleges that they were, and always have been, wholly to the left of the center of the main channel of said stream and on the Missouri side thereof. Respondent further denies that on or about February, 1918, an ice jam occurred downstream a short distance from Station 510, causing the said river suddenly to break through the alluvions aforementioned, and flow through some low chutes and form a new channel near the bluffs upon the right, or Kansas side of said stream, and denies that as a result, approximately two thousand (2,000) acres of land susceptible of identification was separated from the right, or Kansas bank of said stream, and placed upon the left, or Missouri side of the stream. Respondent further denies that for several years, and until approximately 1927, the said Missouri river was divided in its flow and flowed upon each side of said alluvion.

Respondent further denies that during the year 1927, an ice jam occurred at approximately the same station and point as above described, and as a result thereof, the entire body of the stream of the said Missouri river flowed through the alleged new channel formed by the alleged avulsion of 1918. Respondent further denies that since the year 1927, the former channel of said stream upon the left, or Missouri side of said river, has gradually filled up with deposits from said river, but alleges that the main channel of said stream, as it now flows between the points aforesaid, is practically in the same location that it was in 1927 and 1918 and prior thereto and at all times on the west side of the lands herein involved.

VII.

Respondent denies that the riparian owners of the land along the right, or Kansas bank, of said river between Stations 510 and 515 took possession of and occupied the aforementioned lands and denies that such lands were accreted to these lands on the right, or Kansas bank, of said stream. Respondent further denies that said alleged riparian owners along the right, or Kansas bank, of said stream occupied said lands until about 1927, but avers that the residents of the State of Missouri, being owners of said land by virtue of the provisions of the Acts of Congress and the Constitution and the laws of the State of Missouri, took possession of the same and are now occupying these lands as the rightful owners thereof. Respondent further alleges that the lands herein involved are located in Townships 58 and 59 North, Range 38 West, Holt County, Missouri, and that the same is held by residents of the State of Missouri by virtue of Acts of Congress, and the Constitution and laws of the State of Missouri. Respondent further alleges that the aforesaid lands in their present formation were formed and made by accretions deposited by the Missouri river by gradual and continued deposits, along, and against the shore line of said river and by islands forming in said river and by bars forming in said river all on the east, or Missouri side, of the center line of the main channel of the river, and for the reasons aforesaid the accretions, island formations and bar land so made and formed as aforesaid became and are a part of the lands belonging to the State of Missouri and are under its jurisdiction and control.

VIII.

Respondent admits that prior to the year 1881 the Missouri River flowed in a meandering course through Township 7, Range 22 in Atchison County, Kansas and that a great flood occurred in April 1881 and by reason thereof the course of the river in this vicinity suddenly changed and shifted to the westward. Before this sudden change and over a period of years subsequent to the original land surveys in Platte County, Missouri and Atchison County, Kansas the river had gradually changed its course and by erosion and accretion had cut land away from the Kansas side and deposited it on the Missouri side so that part of the land formerly in Township 7, Range 22, Atchison County, Kansas had been shifted by gradual process of change to the Missouri side becoming a part of the land in Township 54 North, Ranges 36 West and 37 West, Platte County, Missouri. The respondent, through its political subdivisions, has exercised control and dominion over land on the Missouri side of the center of the navigable channel of the Missouri River as it existed before the sudden change of April 1881. Respondent denies that complainant, through its political subdivisions, exercised dominion, jurisdiction and control over such lands without interruption or conflict until the year 1930 and alleges tha between the time of the 1881 flood and 1930 there was much litigation and controversy among private landowners and claimants over the location of the boundary line between Kansas and Missouri in this vicinity and such controversy still exists and is involved in a suit now pending in the United States District Court for the District of Kansas, entitled E. T. Meyer v. Arnold D. Saunders, et al., Cause No. 4351, referred to in the complaint herein. Respondent alleges that the boundary line between Kansas and Missouri in this vicinity in question is the center of the navigable channel of the Missouri River as it existed just prior to the flood of 1881.

IX.

Respondent further denies that at points along the course of the Missouri river between War Department Survey Stations 399 and 405, the same being where said stream flows between Leavenworth County, Kansas, and Platte County, Missouri, the main current of the stream, by erosion, gradually

ate into the lowlands along the left, or Missouri side of said stream, and at the same time built up alluvions on the right or Kansas bank of said stream, and thereby adding to the land now commonly known as Delaware Island or Stiger's Island. Respondent further denies that the tract of land to which said alluvial deposits accreted has been owned by the State of Kansas since statehood, and denies that said lands are accreted and denies that they have been occupied and used by the State of Kansas as a part of its prison farm. Respondent admits that through its political subdivisions, it has assumed to exercise domain, jurisdiction and control over a part of the lands described in this paragraph, and has made, executed and delivered a deed thereto to a resident of the State of Missouri, who is now claiming title and ownership to the title of same by virtue of said deed which was recorded at page 13 of the deed record, Volume 130 in the office of the Recorder of Deeds of Platte County, Missouri.

Respondent avers that the lands described in said deed are described as a part of the northwest fractional quarter of Section 16, Township 51 and Range 35 in Platte County, Missouri, and that they are now and always have been within the State of Missouri and that Respondent has a legal right and authority to exercise jurisdiction and ownership of the same.

X.

The Respondent admits that it has taken possession of, claimed, assumed and taken jurisdiction over the land referred to in this complaint, but that it has done so by virtue of the Constitution and Acts of the Congress of the United States and the Treaties pertaining to these lands and to the Constitution of Missouri and the laws thereof; and denies as a result thereof, the Complainant has been wrongfully ousted of its jurisdiction of this territory and has been obstructed from governing persons and property therein located.

XI.

The Respondent admits that it is important and necessary that the true boundary between Complainant and Respondent be fixed and determined, for the following reasons:

1. That the disputed ownership of the lands involved herein may be determined.

2. That the power to tax the above-described lands be determined.

3. That the matters pertaining to the jurisdiction of persons and property may be fixed and determined.

WHEREFORE, the Respondent prays that the boundary at the location aforesaid between Complainant and Respondent be ascertained, established, determined and fixed, and that the rights of ownership, possession, jurisdiction and sovereignty to the territory in controversy be adjudged to the Respondent herein and that the title and right thereto be quieted in this Respondent and that the Complainant be restrained and enjoined from disturbing the Respondent and its subdivisions and peoples from the right to own, use and exercise full control ever said territory which is wrongfully claimed by the Complainant. Respondent joins with the Complainant in her prayer for the appointment of a commissioner to hear the evidence and report findings of fact to this court, respecting the present true boundary between Complainant and Respondent, and that the court will make such further orders in the premses as it may deem just and proper.

ROY McKITTRICK,
Attorney General,

TYRE W. BURTON,
Assistant Attorney General,

COVELL R. HEWITT,
Assistant Attorney General,

Attorneys for Respondent.

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FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

No. [illegible]

THE STATE OF KANSAS,
PLAINTIFF,

vs.

THE STATE OF MISSOURI,
DEFENDANT.

PETITION FOR LEAVE TO FILE A BILL OF INTERVENTION,

and

BILL OF INTERVENTION OF E. A. COLE.

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
His Attorneys.

KELLEY PRINTING CO., TOPEKA

IN THE SUPREME COURT OF THE UNITED STATES

No._____

THE STATE OF KANSAS,
PLAINTIFF,

vs.

THE STATE OF MISSOURI,
DEFENDANT.

PETITION FOR LEAVE TO FILE A BILL OF INTERVENTION.

Comes now E. A. COLE and prays the Court for leave to file his bill of intervention against the State of Missouri, a copy of which bill of intervention is hereto attached.

E. A. COLE,
By ROBERT STONE,

ROBERT STONE,
JAMES A. MCCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
His Attorneys.

Leave to file the said bill of intervention is hereby granted.

Dated at Washington, D. C. this ____ day of _____, 1940.

_____

Chief Justice

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Kansas, Plaintiff,

vs.

The State of Missouri, Defendant.

BILL OF INTERVENTION OF E. A. COLE.

Comes now E. A. Cole, intervenor herein, the permission of this court having first been obtained, and files this intervening bill against the defendant, the State of Missouri, and in support thereof alleges:

I.

The intervenor, E. A. Cole, is a resident and citizen of Doniphan County, Kansas, and is the owner in fee simple of real estate adjacent to the right bank of the Missouri River in Doniphan County, Kansas, located in Sections 11 and 14, Township 2, South, of Range 20, East. Said land is located opposite Sections 25, 26, 27, 35 and 36, Township 58, Range 38, West, in Holt County, State of Missouri, at a point known as Forbes Bend in the Missouri River, being between War Department Survey Stations 510 and 515 on the Missouri River. As a riparian owner, this intervenor is the owner of and entitled to the possession of any and all accretions which have attached to his land above described, and, therefore, has a direct interest in the issue raised by the bill of complaint filed herein by the State of Kansas against the State of Missouri.

II.

Your intervenor alleges that a portion of the land hereinafter referred to, approximating 2,000 acres, and now separated from the right or Kansas bank of the stream, was a true accretion to the land of this intervenor and other riparian owners on the Kansas side between said Stations 510 and 515, was built up and attached to the Kansas side of said river, and was not an island until the accreted land was suddenly cut off from the Kansas shore by the avulsion hereinafter referred to which occurred in or about 1918.

III.

Your intervenor alleges that he should, and prays that he be allowed to appear in person and by counsel at any hearing of said cause and be permitted to examine and cross-examine witnesses who may be produced either by the plaintiff or the defendant, and that he be allowed to produce such other witnesses as he may desire in order that the court may be able to determine whether or not the lands referred to in Forbes Bend accreted to the land of this intervenor and other riparian owners, and that said lands in question were not originally islands in said river, but were true accretions to the right or Kansas side of said river.

IV.

The Plaintiff, the State of Kansas, was duly organized and admitted to the Union on the Twenty-ninth day of January, 1861. The defendant, the State of Missouri,

was duly organized and admitted to the Union on the tenth day of August, 1821.

V.

At the time the State of Kansas was admitted to the Union, the Missouri River, as it then flowed, was established as the eastern boundary of Kansas and the Western boundary of Missouri, from the intersection of said River with the Fortieth Parallel, southward to the mouth of the Kansas River.

VI.

That portion of the Missouri River which was established as the boundary line between the Plaintiff and the Defendant always has been and now is a meandering, fast flowing stream, and the said river flows through rich, sandy soil. As a consequence thereof, the said river frequently has shifted its course, some of which shifting has been gradual and some of which shifting has been sudden; and at this time, the Missouri River does not follow the same course it did at the time it was established as a boundary between Plaintiff and Defendant. Such changes in the course of the Missouri River have given rise to controversies and disputes between Plaintiff and Defendant concerning the true boundary between them. The Defendant, through its subdivisions, is assuming to exercise jurisdiction and control of certain lands within the boundary and territory of the plaintiff, contrary to the rights of the Plaintiff and in defiance of the authority of the Plaintiff.

VII.

The United States Government, through its Department of War, has control over the said Missouri River and has established numerous jetties and constructed numerous revetments along the course of said stream, and as a result thereof, the present channel or course of said Missouri River is now substantially stabilized.

VIII.

In view of the above mentioned disputes concerning the course or channel of said stream, action of this Court is necessary to determine the true boundary in order that Plaintiff and Defendant accurately may determine the location of disputed lands and territory. This becomes necessary in order to determine the jurisdiction of Plaintiff and Defendant over persons and property located in said disputed territory, and particularly those areas hereinafter specifically set out.

IX.

At points along the course of said stream between War Department Survey Stations 510 and 515, the same being where said stream flows between Doniphan County, Kansas, and Holt County, Missouri, the main current of the stream by erosion gradually ate into the lowlands along the left or Missouri side of said stream, and at the same time built up alluvions on the right or Kansas bank of said stream, so that by the year 1918, the river gradually had changed its course to the extent that the center of the stream had shifted several miles

to the east, and several sections of land formerly located in Missouri had been deposited in the stream and lost to identification, and as a part of this same process, extensive alluvial deposits were built up on the right or Kansas side, which said process is known as accretion; that afterward and on or about February, 1918, an ice jam occurred downstream a short distance from Station 515, causing the said river suddenly to break through the alluvions aforementioned, and flow through some low chutes and form a new channel near the bluffs upon the right or Kansas side of said stream; that as a result thereof, approximately two thousand (2,000) acres of land susceptible of identification was separated from the right or Kansas bank of the stream and placed upon the left or Missouri side of the stream. This process is known as avulsion. Thereafter, for several years and until approximately 1927, the said Missouri River was divided in its flow and flowed upon each side of the alluvion so cut off by avulsion, as above described.

Thereafter, and during the year 1927, an ice jam occurred at approximately the same station and point as above described, and as a result thereof, the entire body of the stream of the said Missouri River flowed through the new channel formed by the avulsion of 1918. Since the year 1927, the former channel of said stream upon the left or Missouri side of said river gradually has filled up with deposits from said river, and the new channel cut through the accreted land in 1918 and 1927, as above described herein, became deeper and wider until

the entire flow of the stream now is along the new channel made by the first avulsion.

X.

The riparian owners of the land along the right or Kansas bank of said river between Stations 510 and 515, including this intervenor, took possession of and occupied the alluvial lands as they accreted and were added to their respective holdings along the right or Kansas bank of said stream. The riparian owners along the right or Kansas bank of said stream, including this intervenor, continued to occupy said lands until about 1927 when the second avulsion occurred, at which time residents of the State of Missouri seized possession of said land and by force of arms drove the Kansas owners and occupants therefrom, and ever since said time, residents of the State of Missouri have occupied said lands against the will and over the protest of this intervenor and other Kansas owners thereof.

XI.

The defendant, the State of Missouri, has taken possession of, claimed, assumed and taken jurisdiction over and has obtruded upon all of the land above described, to the eastward of the Missouri River, contrary to the rights of this Plaintiff, and as a result thereof, the Plaintiff, the State of Kansas, wrongfully has been and is being ousted of her jurisdiction over said territory and is obstructed from governing persons and property therein located.

XII.

It is important and necessary that the true boundary between Plaintiff and Defendant be fixed and determined, for the following reasons:

1. That the disputed ownership of the lands may be determined.

2. That the power to tax the above described lands be determined.

3. That all matters pertaining to the jurisdiction of persons and property may be fixed and determined.

WHEREFORE, Your intervenor prays that the lands referred to in Forbes Bend between Stations 510 and 515 be held to be accretions and not islands, and the title to the same be adjudged to be in the riparian owners on the Kansas side of said river as part and parcel of their respecting holdings in Doniphan County, Kansas, and further prays that the common boundary between Plaintiff and Defendant be ascertained, established, determined and fixed, and that the rights of possession, jurisdiction and sovereignty to all the territory in controversy be restored to the Plaintiff herein, and that title and right thereto be quieted in the Kansas riparian owner of land situate between War Department Survey Stations 510 and 515, and that the Defendant, the State of Missouri, be ousted therefrom and be restrained and enjoined from disturbing the Plaintiff and her subdivisions and peoples from the right to use and exercise full control over said territory, now wrongfully held by the Defendant. Your intervenor further prays that a

subpoena be issued to the Defendant, the State of Missouri, and that the Defendant be required, at a date named, to answer this intervening bill, and that the Court appoint a commissioner to hear the evidence and report findings of fact to this Court respecting the present true boundary between Plaintiff and Defendant, and that this Plaintiff have such other and further relief as may be just and equitable.

E. A. Cole,

By_____

Robert Stone,
James A. McClure,
Robert L. Webb,
Beryl R. Johnson,
Ralph W. Oman,
His Attorneys.

Topeka Kansas

FILE COPY

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FILED
JUN 10 1940
CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

No. 11, Original.
October Term, 1940.

STATE OF KANSAS,
PLAINTIFF,

vs.

STATE OF MISSOURI,
DEFENDANT.

MOTION AND MEMORANDUM TO RECONSIDER AND ALLOW THE PETITION OF E. A. COLE FOR LEAVE TO INTERVENE IN THE ABOVE ENTITLED CAUSE.

E. A. COLE, Petitioner,
By ROBERT STONE,
His Attorney,
Topeka, Kansas.

Of counsel:
Stone, McClure, Webb, Johnson & Oman,
Topeka, Kansas.

KELLEY PRINTING CO., TOPEKA

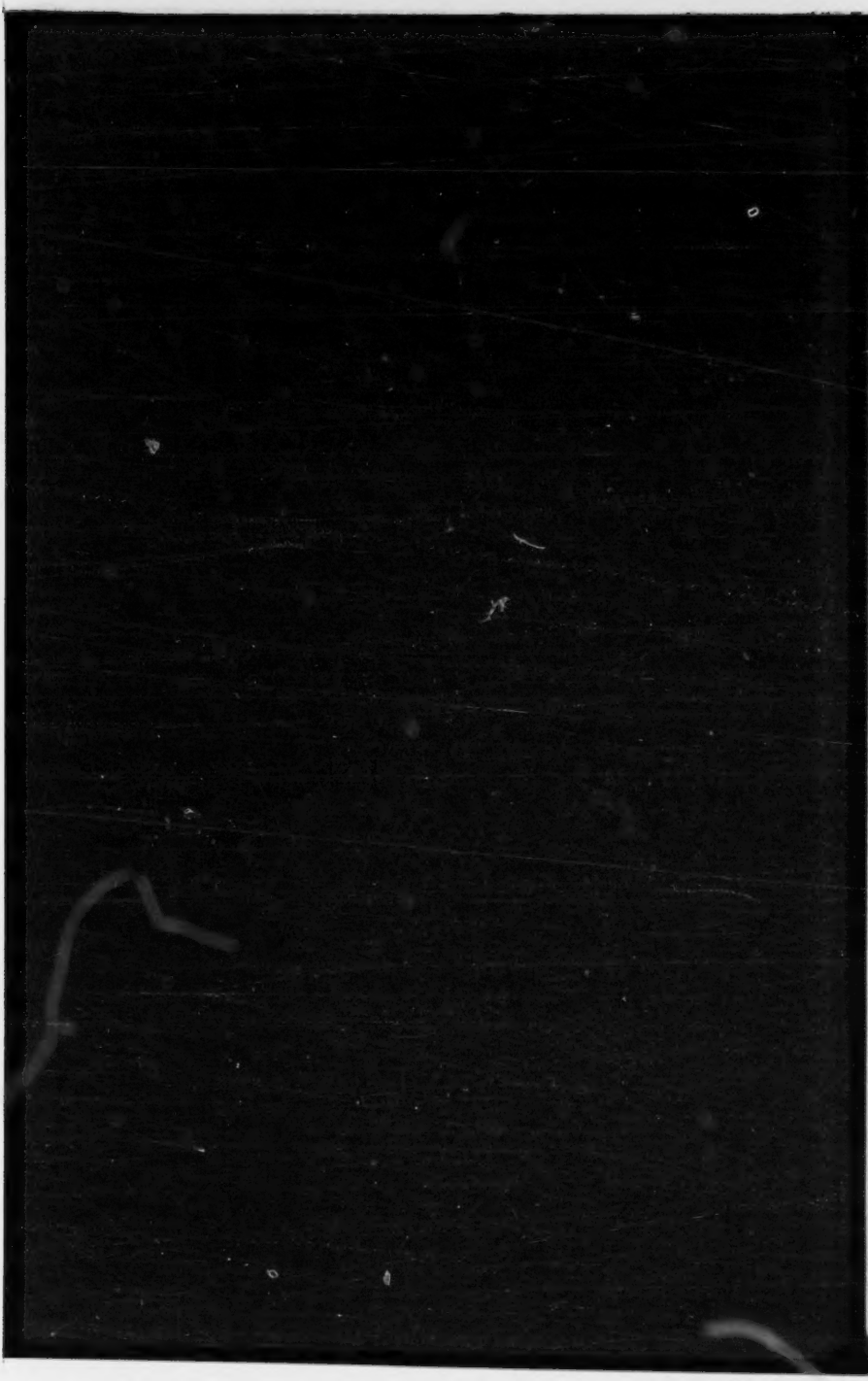


TABLE OF CASES.

	Page
Cissna v. State of Tennessee, 246 U. S. 289, 38 S. C. 306	3
Oklahoma v. Texas, 256 U. S. 70, 41 S. C. 420	4
Tennessee v. Arkansas, 246 U. S. 158, 38 S. C. 301	3

IN THE SUPREME COURT OF THE UNITED STATES

No. 11, Original.
October Term, 1940.

STATE OF KANSAS,
PLAINTIFF,

vs.

STATE OF MISSOURI,
DEFENDANT.

MOTION AND MEMORANDUM TO RECONSIDER AND ALLOW THE PETITION OF E. A. COLE FOR LEAVE TO INTERVENE IN THE ABOVE ENTITLED CAUSE.

Your petitioner respectfully refers to his petition for leave to file a bill of intervention and the bill of intervention attached thereto heretofore filed in said cause, which petition was by the Court denied on June 3, 1940.

Your petitioner now prays the Court to reconsider said petition and to allow him to file said intervening petition in the above-entitled cause, and in support thereof represents:

I.

Petitioner is the owner of a tract of land along the right bank of the Missouri River opposite to what is known as Forbes Bend, where the river runs between Doniphan County, Kansas, and Holt County, Missouri.

Petitioner claims that a large tract of land to-wit, nearly two thousand (2,000) acres which accreted to his land, was, about 1919, by sudden avulsion of the river cut off from his farm, the river running through a chute along the original channel of the stream, thereby forming an island of said two thousand acres; that said land rightfully belongs to the petitioner, but that the State of Missouri, through its political subdivision, Holt County, seized said land, sold the same to citizens of Missouri and executed deeds thereto, and petitioner and his tenants were driven from his accreted lands by force, and he was thus unlawfully deprived of the use of his property.

Your petitioner is unable to have determined the title of his property as between the Missouri claimants and himself, because they will not submit to the jurisdiction of the Kansas court and if your petitioner should file suit in the Missouri court, he will thereby prejudice his rights by admitting jurisdiction of said court.

II.

(a) For the above reason, the petitioner is interested in the determination of the boundary between Holt County, Missouri, and Doniphan County, Kansas, and desires the right to appear and be heard in the proceedings in the above-entitled cause and to present wit-

nesses and to examine and cross examine all witnesses whose testimony relates to the true boundary between said states.

(b) It is of interest to your petitioner to show that the lands in question constituted a *true accretion* to his land and *did not* constitute *an island* in said stream.

(c) The rights of your petitioner would be prejudiced if the true facts were not shown in this cause and witnesses were not called who would testify that the land in question was originally attached to the land of petitioner and not originally formed as an island in the stream.

(d) Your petitioner is authorized to state that the Attorney General of the State of Kansas has no objection to petitioner being allowed to intervene in said cause, and, indeed, desires that an order allowing such intervention be made so that petitioner might produce evidence showing the real facts and assist the State of Kansas in having determined the true boundary between the said states.

III.

In support of said petition, attention is called to the litigation fixing the boundary between the States of Tennessee and Arkansas, 246 U. S. 158, 38 S. C. 301, and the companion case of *Cissna, Plaintiff in Error vs. The State of Tennessee,* 246 U. S. 289, 38 S. C. 306, wherein the title of Cissna to the land was incidentally determined and the decree in the state court was reversed and remanded.

We also call attention to the case of *Oklahoma vs. Texas,* 256 U. S. 70, 41 S. C. 420, in which the United States was first allowed to intervene, in which a receiver of the property involved was appointed, and in which orders were made that any claimant claiming under a patent, lease or permit from the State should be at liberty to request any modification of the order deemed essential or appropriate for the right of full protection of the interests of such state or claimant or any claimant claiming under the State of Texas or any other claimant a party to the cause made, and requisite process issued and served so that all parties claiming an interest in the subject matter might be before the court. 252 U. S. 372, 40 S. C. 352.

We also cite 253 U. S. 465, 40 S. C. 580, in the same cause. On June 7, 1920, an order was made permitting certain oil companies to file intervening petitions; "and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920." 253 U. S. 471, 40 S. C. 585.

Later, on October 18, 1920, E. Everett Rowell was granted leave to intervene. 41 S. C. 12.

Orders were later made respecting the rights of the claimants to the property and the receiver was ordered to return certain wells to the claimants. 41 S. C. 146.

Other orders of distribution were made to individual claimants. 41 S. C. 317, 318, 319.

WHEREFORE, Your petitioner respectfully prays that his petition for permission to intervene be reconsidered and allowed by the Court.

Respectfully submitted,

E. A. COLE, Petitioner,

By ROBERT STONE, His Attorney.

Of counsel:

Stone, McClure, Webb, Johnson & Oman,
Topeka, Kansas.

FILE COPY

MEMORANDUM OF THE STATE OF KANSAS

Supreme Court, U. S.
FILED
JUL 5 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

1941

No. ~~11~~ Original

THE STATE OF KANSAS, *COMPLAINANT*,

VS.

THE STATE OF MISSOURI, *RESPONDENT*.

JAY S. PARKER,
Attorney General,

A. B. MITCHELL,
Asst. Attorney General,

CLARENCE V. BECK,
Emporia, Kansas,

ERRETT P. SCHRIVNER,
Kansas City, Kansas,

ARTHUR STANLEY, SR.,
Kansas City, Kansas,

Attorneys for Complainant.

H. M. IVES & SONS, TOPEKA

IN THE

Supreme Court of the United States

October Term, 1940

No. 11 Original

THE STATE OF KANSAS, *COMPLAINANT*,

VS.

THE STATE OF MISSOURI, *RESPONDENT*.

MEMORANDUM OF THE STATE OF KANSAS

Comes now the State of Kansas by its attorneys, Jay S. Parker, Attorney General of the State of Kansas, A. B. Mitchell, Assistant Attorney General, C. V. Beck, Errett P. Schrivner, and Arthur Stanley, Sr., and respectfully show to the Court that the State of Kansas is desirous that those persons claiming title to lands involved in the boundary dispute between the State of Kansas and the State of Missouri be allowed to intervene in this cause, believing that such interventions will assist both states in producing all pertinent evidence upon the matters in question.

Complainant further alleges that those individuals claiming title to the disputed lands have, to an appreciable de-

gree, an interest in the determination of this suit similar to the interest of the state in which such individuals live, and will, if permitted, assist in the presentation of these matters to the honorable Court.

That the authority for the institution of this action by the Attorney General of the State of Kansas is to be found in Chaper 355 of the Laws of Kansas for 1939, a copy of which is as follows, to-wit:

"RELATING TO THE MISSOURI RIVER BOUNDARY BETWEEN THE STATE OF KANSAS AND THE STATE OF MISSOURI, AND MAKING AN APPROPRIATION.

House Joint Resolution No. 2

A Joint Resolution relating to the Missouri river boundary between the state of Kansas and the state of Missouri, and making an appropriation.

WHEREAS, It appears that by gradual accretion to the right bank of the Missouri river between Doniphan county, Kansas, and Holt county, Missouri, a large amount of land was added to the riparian owners' land on the Kansas side and the thread of the stream was shifted gradually several miles to the east at a point known as Forbes Bend, thus changing the boundary line between the two states at that point; and

WHEREAS, At a later time, by a sudden shifting of the stream, known as an avulsion, the river at that point cut through one of the chutes nearer to the Kansas bank so that the thread of the channel now lies between the right bank of the river and a large portion of the accreted lands, to wit: about two thousand acres, which are east of the present channel but west of the abandoned river bed, which by reason of the gradual shifting of its course to the east became the dividing line between the two states; and

WHEREAS, Said accreted lands were occupied and cultivated as a part of their river bank farms by owners

of the river bank upon the Kansas side prior to said avulsion, and after said avulsion and shifting of the channel toward the Kansas bank certain residents of Missouri seized possession of said accreted lands and forcibly held possession thereof, and afterward the county of Holt in the state of Missouri assumed the right to, and did sell and deed said lands to said Missouri claimants who are now in possession of said lands; and

WHEREAS, There may be other points along said Missouri river between the states of Missouri and Kansas where, by reason of accretions and avulsions, the true boundary between the said two states may be uncertain and should be determined; and

WHEREAS, The State of Kansas owns half of the abandoned river bed which extends for more than six miles along Forbes Bend and any other abandoned Missouri river beds along its boundary; and

WHEREAS, A state should be jealous of its boundary lines, not only in order to protect the rights of its citizens but also to place upon the tax rolls for the benefit of the state and all of its subordinate municipalities, all lands that properly belong within its boundaries; and

WHEREAS, There is no way by which the individuals can litigate the right to said lands, and no court can judicially determine the boundaries between two states except only the supreme court of the United States in an original action between the two states for the determination of such controversies: Now, therefore,

Be It Resolved by the House of Representatives of the State of Kansas, the Senate Agreeing Thereto:

SECTION 1. That the attorney general of the state of Kansas be, and he is hereby authorized and directed to cause to be commenced an action or actions in the name of the state of Kansas against the state of Missouri in the supreme court of the United States and to do any and all other things advisable for the purpose of determining and fixing the true boundary between said states along the river between Doniphan county, Kansas, and Holt county, Missouri, in the vicinity of

Forbes Bend, and at any other points, if any, where a controversy may exist as to the true boundary between said states along said river: *Provided, However,* No suit shall be commenced or money appropriated herein expended until efforts have failed to settle said dispute by agreement with the state of Missouri.

SEC. 2. For the purpose of paying the actual expenses and costs in connection therewith, there is appropriated out of the treasury of the state of Kansas the sum of ten thousand dollars ($10,000) as a contingent fund, to be paid out by the treasurer upon vouchers signed by the attorney general and approved by the governor for costs and expenses in connection with said suit or suits, no part of which shall be expended for any attorneys' fees.

SEC. 3. It is hereby provided that in the event any individual shall be determined to be the owner of any accreted land involved in the litigation provided for herein, then and in that event any balance of costs or expenses incurred by the state of Kansas on account of such tract of land so determined to belong to such individual, after deducting any costs which might be assessed against the state of Missouri or against individuals interested in such litigation, shall be and become a first lien upon such land in favor of the state of Kansas.

SEC. 4. That in the interest and especially for the state of Kansas, that the rights of its sovereignty be fully and adequately represented legally, the attorney general of the state of Kansas, upon the direction and with the consent of the governor of the state, is hereby authorized and empowered to engage the service of a special assistant attorney general to represent officially the state of Kansas in the contemplated and proposed litigation as provided in this act, if and when such litigation is instituted, to the end that if such land involved in such litigation be an island, property of the state, that the special rights of the state therein and thereto as such be determined and adjudicated in such litigation; and for the purpose of defraying all expense actually and necessarily incurred upon behalf of the

state by such special representation of the state, including the fee of counsel so employed as an assistant attorney general, his travel expense, hotel and such other expense incurred in the performance of his duties in connection with such litigation, there is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of $5,000, or so much thereof as may be necessary, and the auditor of state is hereby authorized, empowered and directed to draw his warrants upon the treasurer of state and against the fund appropriated in this section upon duly itemized and verified vouchers filed in his office, approved by the attorney general and the governor of the state of Kansas.

SEC. 5. The auditor of state is hereby authorized and directed to draw his warrants upon the treasurer of the state for the amounts appropriated in section 2 of this act.

SEC. 6. This resolution shall take effect and be in force from and after its publication in the official state paper.

Approved April 3, 1939.

Published in official state paper April 10, 1939."

Respectfully submitted,

JAY S. PARKER,
Attorney General,
A. B. MITCHELL,
Asst. Attorney General,
CLARENCE V. BECK,
Emporia, Kansas,
ERRETT P. SCHRIVNER,
Kansas City, Kansas,
ARTHUR STANLEY, SR.,
Kansas City, Kansas,

Attorneys for Complainant.

Office - Supreme Court, U. S.
FILED
OCT 11 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 8, Original

THE STATE OF KANSAS,

Complainant,

vs.

THE STATE OF MISSOURI.

REPORT OF THE SPECIAL MASTER.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 9, Original

THE STATE OF KANSAS,

Complainant,

vs.

THE STATE OF MISSOURI,

Respondent.

INDEX TO REPORT.

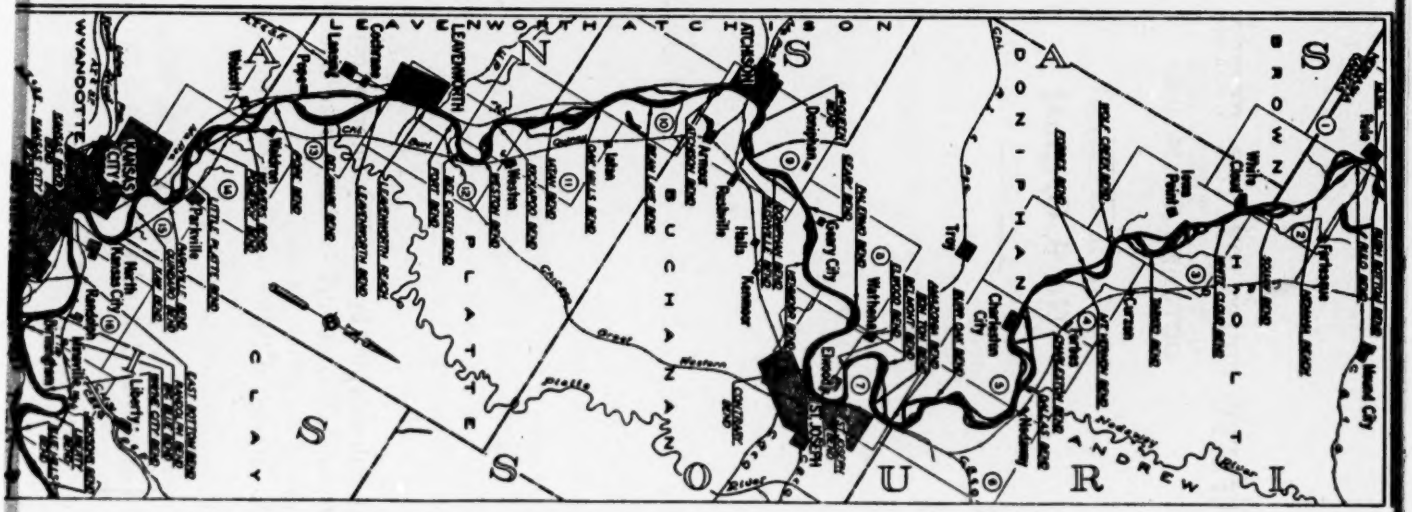
A.

	Page
Submission of the Report of the Special Master	3

B.

Report of Special Master	11
I. Statement of the Pleadings	11
II. Jurisdiction of this Court	19
III. The Missouri River	20
IV. Discussion of the Evidence	30
Island Formation and Divided Flow	33
Ice Jam of 1917-'18	54
V. Discussion of Law in its Application to the Evidence	58
VI. Stipulations Concerning Boundary	88
VII. Findings of Facts	91
VIII. Conclusions of Law	94
IX. Recommendations for a Decree	96
Appendices A, B, and C	111

1941 Project Map
Rulo, Neb., to Kansas City, Mo.,
U. S. Engineer Office: Kansas City District



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 9, Original

THE STATE OF KANSAS,

Complainant,

vs.

THE STATE OF MISSOURI,

Respondent.

A.

SUBMISSION OF THE REPORT OF THE SPECIAL MASTER.

To the Honorable the Supreme Court of the United States:

By an Order of this Honorable Court of February 10, 1941 (312 U. S. 652, 61 Sup. Ct. 617, 85 Law Ed. 1104), the undersigned Samuel M. Wilson was appointed Special Master in the above-styled cause. The appointment was forthwith accepted by said Wilson, who thereupon qualified as Special Master and in due course undertook the discharge of his duties as such.

The aforesaid Order is in words as follows:

"Order

"It is ordered that Samuel M. Wilson, Esquire, of Lexington, Kentucky, be, and he is hereby, appointed

Special Master in this cause, with authority to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the Master shall be subject to consideration, revision, or approval by the Court. The Master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a Master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein."

In obedience to the foregoing Order, the undersigned, as Special Master, after some time spent in studying the pleadings in order to acquaint himself with their contents and the nature and scope of the issues involved, communicated with counsel for the respective parties for the purpose of ascertaining the most convenient place for conducting hearings and the views and wishes of the parties and their counsel with respect thereto. As a consequence, it was unanimously agreed by all concerned that Kansas City, Missouri, would best suit the pleasure and convenience of all as the principal place for the contemplated hearings.

Pursuant to due notice given by the Special Master to the parties, through their counsel of record, the initial proceedings in the cause were begun and held in Kansas City, Missouri, on Monday, March 17, 1941. (Tr. I, 1-27.) On

this occasion, most of the time was devoted to an analysis and discussion of the pleadings and the main points at issue. At the conclusion of this hearing an adjournment was taken until April 14, 1941, at the same place. The parties by counsel reconvened before the Special Master at Kansas City, Missouri, on Monday, April 14, 1941, (Tr. I, 28-69,) and at this session further preliminary proceedings were had, particularly with reference to the method of procedure and the best means of expediting the cause. The meeting adjourned on the same date subject to the call of the Special Master.

Pursuant to call of the Special Master, of which notice was timely given, the parties by counsel reassembled before him in Kansas City, Missouri, on Monday, June 16, 1941, and thereupon the introduction of evidence was begun by counsel on behalf of the Complainant, the State of Kansas. (Tr. I, 70-173.) At the close of the day's proceedings, the further taking of evidence was adjourned until Wednesday, June 18, 1941, at St. Joseph, Missouri. In the interim and on Tuesday, June 17, 1941, the Special Master, in company with counsel for the respective parties, made a tour by automobile along the Missouri River northward from Kansas City, Mo., to a point within twelve or fifteen miles of the southern boundary line of the State of Nebraska. This was done for the purpose of making a personal inspection of the terrain and the river along the route, in an endeavor to clarify the facts involved under the issues in the case, and, more especially, the three principal points or areas along the Missouri River boundary between Kansas and Missouri, around which the controversy chiefly centered, namely, Stiger's Island, Iatan Bend, and Forbes' Bend. A short statement describing this trip is in the record. (Tr. I, 174, 175, and Tr. II, 810.)

Pursuant to the order of adjournment previously mentioned, the parties by counsel again appeared before the

Special Master at St. Joseph, Missouri, on Wednesday, June 18, 1941, and the further hearing and taking of testimony were then and there resumed. Hearings in St. Joseph, Missouri, occupied the days of June 18, 19, and 20, 1941. (Tr. I, 174-693.) On Friday, June 20, the further taking of testimony in the case was continued until June 25, 1941, at the same place. (Tr. I, 692, 693.) During this interval and on June 23 and 24, 1941, the Special Master, accompanied by counsel for the respective parties, made a trip by boat, on the Missouri River, upstream and along its course, from Kansas City, Missouri, as far north as Rulo, Nebraska. This trip was arranged for and provided through the co-operation and courtesy of the Kansas City Division of the U. S. Engineer Department, which furnished transportation on the Government inspection boat *Sergeant Floyd*. A brief account of all this is contained in the record. (Tr. I, 692, 693; Tr. II, 694-696.)

The taking of testimony was resumed in St. Joseph, Missouri, on Wednesday, June 25, with all parties present, and continued at that point through the days of June 25, 26, and 27, 1941. At the close of the hearing on June 27, 1941, the further taking of testimony in the case was ordered adjourned until Monday, June 30, 1941, at Kansas City, Missouri. (Tr. II, 972.)

Pursuant to the adjournment last mentioned, the Special Master, together with counsel for the respective parties, resumed the hearing of testimony in Kansas City, Missouri, on June 30, 1941, (Tr. II, 1032.) At the close of this session, the next taking of testimony was ordered to be held in the City of Atchison, Kansas, on Tuesday, July, 1, 1941, and the further hearing of the case was accordingly adjourned to that time and place. (Tr. II, 1101.) With the completion of the hearing in Atchison, (Tr. II, 1102-1172,) all parties returned in the afternoon of the same day (July 1,) to Kansas City, Missouri, where they reconvened, at

the offices of the U. S. Engineer Department in the Davidson Building, in Kansas City, (Tr. II, 1172, and 973.) The testimony taken during this session is reported in Tr. II, 973-986; 1173-1190, and at the conclusion thereof, the hearing was adjourned until the following day, July 2, 1941, at the Federal Building, in Kansas City, Mo. (Tr. II, 1190.) All parties reconvened pursuant to this order of adjournment and, on July 2, 1941, proceedings were had and testimony taken as reported in the record. (Tr. II, 1191-1234, and 1278-1356.)

The taking of testimony not being completed, the hearing was adjourned at the close of the session on July 2, 1941, until the following morning, (Tr. II, 1356,) and pursuant to this order of adjournment, all parties reconvened on Thursday, July 3, 1941. (Tr. II, 987.) The proceedings of this date are reported in the record in Tr. II, 987-1031, 1235-1246, 1247-1277, 1359-1378, and 1379-1396; the sittings being held alternately in the Davidson Building and in the Federal Building in Kansas City.

The taking of testimony was finally concluded on July 3, 1941, and the further hearing of the case was then adjourned, subject to the call of the Special Master, at such time and place as he might designate (Tr. II, 1396.)

Pursuant to call of the Special Master, of which notice was timely given, the parties by counsel reconvened before the Special Master in Kansas City, Missouri, on Monday, March 16, 1942, at which time and place proceedings were had and further testimony was taken as set forth in the record in Tr. II, 1397-1450. At this hearing, it was formally announced by counsel for both sides that they had fully completed the introduction of their testimony and, except for certain Stipulations remaining to be agreed upon and to be presented and filed later, counsel for each of the parties announced that they had closed. (Tr. II, 1437.) Time was granted and fixed by the Special Master for the

filing within such time of printed briefs by counsel for the respective parties and it was indicated that an oral argument of the case would be heard by the Special Master at such time and place as he might thereafter designate. (Tr. II, 1447, 1448.)

Said session of March 16, 1942, was thereupon adjourned subject to the call of the Special Master. (Tr. II, 1450.)

A printed brief for the Complainant, the State of Kansas, in the requisite number of copies, was filed with the Special Master on May 16, 1942, and a printed brief for the Respondent, the State of Missouri, in the requisite number of copies, was likewise filed with the Special Master on June 27, 1942. Acknowledgments of the service of these briefs were also filed. (Tr. III, Exhibits 1 and 2, in envelope facing page 1638.) No other briefs were filed by either side.

Thereafter, for the final oral argument of the case, counsel for the respective parties met with the Special Master in the latter part of August, 1942, in Lexington, Kentucky, where, on August 24 and 25, such arguments were presented, as shown by the report of proceedings and argument in Tr. III, 1452-1637, of the record. Final adjournment of the entire proceedings before the Special Master was had on August 25, 1942, with the single proviso that the parties, by counsel, would later produce and file a written Stipulation settling the specific controversy between them with respect to the boundary in the Iatan Bend area. For causes over which the parties apparently had no control and for which they are not to be held responsible, the completion and filing of this Stipulation were delayed beyond their expectation, but same was actually produced to and filed by the Special Master as a part of the record on June 1, 1943. (Tr. III, 1639.) The documents evidencing the said Stipulation are designated Complainant's Exhibits 140 and 141

and same are contained in the envelope inserted in Tr. III, between pages 1637 and 1638 thereof.

The entire record thus made up and returned to the Court by the Special Master herein with this Report consists of three volumes of Transcript, together with seven packages of Exhibits, and forty copies each of two printed briefs, as more fully and specifically mentioned and described in the certificate of the Special Master (Tr. III, 1640, 1641.)

Appreciation on behalf of this Honorable Court and of its Special Master is hereby expressed to the officers of the United States Court for the Western District of Missouri, both in Kansas City and in St. Joseph, and to the officers of the United States Court for the Eastern District of Kentucky, at Lexington, for their marked courtesy in providing suitable rooms and facilities for conducting the hearings herein.

Now, in pursuance of the above Order of February 10, 1941, and upon the basis of the evidence taken and returned as aforesaid by the undersigned, he herewith submits to the Court his Report as Special Master herein, embodying his findings of fact, conclusions of law, and recommendations for a decree.

Respectfully submitted,

SAMUEL M. WILSON,
Special Master.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 9, Original

THE STATE OF KANSAS,

Complainant,

vs.

THE STATE OF MISSOURI,

Respondent.

B.

REPORT OF SPECIAL MASTER.

I.

Statement of the Pleadings.

This action was commenced by a Bill of Complaint filed in this Court May 27, 1940, accompanied by a motion for leave to file, which on the same date was granted. (310 U. S. 614; 60 Sup. Ct. 1084; 84 Law Ed. 1390.) On June 3, 1940, a petition of E. A. Cole for leave to file a Bill of Intervention, with which a Bill of Intervention was tendered, was denied (310 U. S. 616; 60 Sup. Ct. 1090; 84 Law Ed. 1391.) On June 10, 1940, said Cole filed a motion to reconsider his said petition for leave to intervene and the order denying same, and, on October 21, 1940, said motion to reconsider was denied. On the same

date (October 21, 1940), the Respondent's Answer to the Complaint was received and filed. (311 U. S. 614; 61 Sup. Ct. 58; 85 Law Ed. 389.)

The suit was filed by the Attorney General of the State of Kansas, in association with other employed counsel, in pursuance of authority conferred by a Joint Resolution of the two houses of the General Assembly of that State, approved April 3, 1939, which took effect on April 10, 1939, upon its publication in the official State paper of said date, (Laws of Kansas, for 1939, Chapter 355, and Memorandum of the State of Kansas, herein filed July 5, 1940, at pages 2 to 5 thereof.) By Section 1 of said Joint Resolution, the Attorney General of the State of Kansas was authorized and directed, not only to institute in this Court an action in the name of the State of Kansas against the State of Missouri, but also

> "to do any and all other things advisable for the purpose of determining and fixing the true boundary between said states along the river between Doniphan county, Kansas, and Holt county, Missouri, in the vicinity of Forbes Bend, and at any other points, if any, where a controversy may exist as to the true boundary between said states along said river; *Provided, however,* No suit shall be commenced or money appropriated herein expended until efforts have failed to settle said dispute by agreement with the state of Missouri."

No question has been made by the Respondent, the State of Missouri, as to the warrant of Complainant's counsel for bringing the suit, and in the pleadings of the parties it is expressly alleged and admitted that certain "changes in the course of the Missouri River have given rise to controversies and disputes between Complainant and Respondant concerning the true boundary between them," and that "in view of the above-mentioned disputes • • • action of this Court is necessary to determine the true boundary"

between them. The plain implication from this, as well as from analogous statements in Complainant's motion for leave to file its Bill of Complaint, is that, prior to the commencement of this action, efforts on the part of the State of Kansas to settle said disputes by agreement with the State of Missouri had been made and that such efforts had failed, within the meaning of the proviso in Section 1 of the above-mentioned Joint Resolution of the State of Kansas. On this point, moreover, no question was raised by or on behalf of the Respondent.

The Bill of Complaint sets out that, at the time the State of Kansas was admitted to the Union, on the 29th day of January, 1861, the Missouri River, as it then flowed, constituted the eastern boundary of Kansas and the western boundary of Missouri, and a common boundary between the two states from the intersection of said river with the 40th parallel, north latitude, southward to the mouth of the Kansas or Kaw River, where it enters the Missouri River.

The bill then alleges (Par. III) that the Missouri River "frequently has shifted its course, some of which shifting has been gradual and some of which shifting has been sudden; and, at this time, the Missouri River does not follow the same course it did at the time it was established as a boundary" between the two states mentioned. Such changes in the course of the river have given rise to controversies between the parties concerning the true boundary between them, and (Par. V) "in view of these disputes concerning the course or channel of said stream, action of this Court is necessary to determine the true boundary."

In paragraphs VI, VII, VIII, and IX, of the Complaint, certain specified portions of the river boundary are described and identified as areas of especially acute and

irreconcilable controversy, and then, in paragraphs X and XI, with which the pleading concludes, it is charged,

> "The defendant, the state of Missouri, has taken possession of, claimed, assumed and taken jurisdiction over and has obtruded upon all of the land referred to in this complaint, contrary to the rights of this plaintiff; and as a result thereof, the plaintiff, the state of Kansas, wrongfully has been and is being ousted of her jurisdiction over said territory, and is obstructed from governing persons and property therein located."

"It is important and necessary that the true boundary between plaintiff and defendant be fixed and determined" for several reasons stated, and plaintiff "prays that the common boundary between plaintiff and defendant be ascertained, established, determined and fixed, and that the rights of ownership, possession, jurisdiction and sovereignty to all the territory in controversy be restored to the plaintiff herein, and that the title and right thereto be quieted in the plaintiff," etc.

In the Answer of the Respondent, filed on October 21, 1940, as hereinabove stated, all the material allegations in the first five paragraphs of the Bill of Complaint are admitted except, of course, that the State of Missouri denies that it is assuming to exercise or is exercising jurisdiction or control over any lands or territories of the Complainant. It then makes appropriate response to the allegations in paragraphs VI, VII, VIII, and IX of the Complaint, with respect to the specified portions of the river boundary, and joins issue with those allegations. In paragraphs X and XI in its Response, Missouri concludes as follows:

> "The Respondent admits that it has taken possession of, claimed, assumed and taken jurisdiction over the land referred to in this complaint, but that it has done so by virtue of the Constitution and Acts of the Con-

gress of the United States and the Treaties pertaining to these lands and to the Constitution of Missouri and the laws thereof; and denies as a result thereof, the Complainant has been wrongfully ousted of its jurisdiction of this territory and has been obstructed from governing persons and property therein located.

"The Respondent admits that it is important and necessary that the true boundary between Complainant and Respondent be fixed and determined,"

for the same reasons urged by the Complainant, and Respondent "prays that this boundary at the location aforesaid between Complainant and Respondent be ascertained, established, determined and fixed, and that the rights of ownership, possession, jurisdiction and sovereignty to the territory in controversy be adjudged to the Respondent herein and that the title and right thereto be quieted in this Respondent," etc.

At a kind of pre-trial conference held by the Special Master with counsel for the respective parties in the month of March, 1941 (Tr. I, 6-20), it was agreed that the present action contemplates and it is the aim and desire of both sides that there be a complete determination of the entire river boundary between the two States and not merely an adjudication of their rights in and to the three particular sections of the boundary specified in paragraphs VI, VII, VIII, and IX of both Complaint and Answer. (Tr. I, 12, 13, 17, 19.) The entire case has been conducted throughout in accordance with this understanding.

The three areas along the river, about which there have been sharp differences between the parties, are known respectively as Forbes Bend, Iatan Bend or Cow Island, and Delaware Island, Stiger's Island or Prison Farm Island. Paragraphs VIII and IX of the Complaint and Answer dealt with the second and third of these areas, but since those specific controversies have been adjusted by mutual stipulations between the parties, it is unnecessary here to

say more concerning them. The removal of these two areas from the field of controversy leaves the Forbes Bend area as the only specific location requiring consideration and determination. The issues respecting that part of the Missouri River known as Forbes Bend are presented in paragraphs VI and VII of the Bill of Complaint as follows:

"VI.

"At points along the course of said stream between War Department [Channel Mileage] Survey Stations 510 and 515, the same being where said Stream flows between Doniphan county, Kansas, and Holt county, Missouri, the main current of the stream, by erosion, gradually ate into the lowlands along the left or Missouri side of said stream, and at the same time built up alluvions on the right or Kansas bank of said stream, so that by the year 1918, the river gradually had changed its course to the extent that the center of the stream had shifted several miles to the east, and several sections of land formerly located in Missouri had been deposited in the stream and lost to identification, and as a part of this same process, extensive alluvial deposits were built up on the right or Kansas side, which said process is known as accretion. Plaintiff is unable to state whether the alluvions were formed as an island or originally were attached to the right or Kansas side of the stream, but in either event, they were wholly to the right of the center of the stream; that afterward and on or about February, 1918, an ice jam occurred downstream a short distance from Station 510, causing the said river suddenly to break through the alluvions aforementioned, and flow through some low chutes and form a new channel near the bluffs upon the right or Kansas side of said stream; that as a result thereof, approximately two thousand (2,000) acres of land susceptible of identification were separated from the right or Kansas bank of the stream and placed upon the left or Missouri side of the stream. This process is known as avulsion. Thereafter, for

several years and until approximately 1927, the said Missouri river was divided in its flow and flowed upon each side of the alluvion so cut off by avulsion, as above described.

"Thereafter, and during the year 1927, an ice jam occurred at approximately the same station, [510,] and point as above described, and as a result thereof, the entire body of the stream of the said Missouri river flowed through the new channel formed by the avulsion of 1918. Since the year 1927, the former channel of said stream upon the left or Missouri side of said river gradually has filled up with deposits from said river, and the new channel cut through the accreted land in 1918 and 1927, as above described herein, became deeper and wider until the entire flow of the stream now is along the new channel made by the first avulsion."

"VII.

"The riparian owners of the land along the right, or Kansas bank, of said river between Stations 510 and 515 took possession of and occupied the alluvial lands as they accreted and were added to their respective holdings along the right, or Kansas bank, of said stream. The riparian owners along the right, or Kansas bank, of said stream continued to occupy said lands until about 1927 when the second avulsion occurred, at which time residents of the state of Missouri seized possession of said land and by force of arms drove the Kansas owners and occupants therefrom, and ever since said time, residents of the state of Missouri have occupied said lands against the will and over the protest of the Kansas owners thereof."

Of these paragraphs of the Complaint the respondent, in the corresponding paragraphs VI and VII of its Answer, makes denial in the terms of complainant's pleading.

Insofar as Forbes Bend is concerned, the essence of respondent's defense, in its affirmative form, is set out in these words:

> Respondent "alleges that the main channel of said stream, as it now flows between the points aforesaid, is practically in the same location that it was in 1927 and 1918 and prior thereto and at all times on the west side of the lands herein involved.
>
> "Respondent further alleges that the aforesaid lands in their present formation were formed and made by accretions deposited by the Missouri river by gradual and continued deposits, along, and against the shore line of said river and by islands forming in said river and by bars forming in said river all on the east, or Missouri, side, of the center line of the main channel of the river, and for the reasons aforesaid the accretions, island formations and bar land so made and formed as aforesaid became and are a part of the lands belonging to the State of Missouri and are under its jurisdiction and control."

The land claimed by the State of Kansas was originally Missouri land forty years ago, and this very same land or its equivalent is today east of the Missouri River and outside the boundaries of Kansas as they stood forty years ago. The complainant, therefore, is seeking to recover land which it claims to have captured from Missouri by a gradual change in the channel of the river and the imperceptible process of accretion but which, in consequence of two successive avulsions, was snatched or torn away from Kansas and restored to practically the same position it occupied before there was ever any shift in the river. Kansas, in other words, occupies physiographically the same relation to the river and to these disputed lands in Forbes Bend today that it did forty years ago, and its rights turn upon the legal relationship or political sovereignty

which it claims to sustain to these lands, notwithstanding their present separation from Kansas proper by the Missouri River.

The rule of liberality which obtains in the treatment of controversies between States, as respects the issues arising both upon the pleadings and the evidence, is illustrated by such cases as *Handly's Lessee* v. *Anthony*, 5 Wheaton (18 U. S.) 374, 5 Law Ed. 113; *Kansas* v. *Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 Law Ed. 838; *Virginia* v. *West Virginia*, 222 U. S. 17, 32 Sup. Ct. 4, 56 Law Ed. 71; and *Same* v. *Same*, 234 U. S. 117, 121, 34 Sup. Ct. 889, 58 Law Ed. 1243. In *Nebraska* v. *Iowa*, 143 U. S. 359, 368, 12 Sup. Ct. 396, 36 Law Ed. 186, 190, the Court significantly remarked:

> "The case before us is presented on testimony, and not on allegation."

In the progress of this hearing we have also taken cognizance of the new rule of civil procedure in District Courts of the United States (Rules of Civil Procedure, Rule 8 (f), and Rule 61, last sentence) in harmony with which it is held that the pleadings must be construed most favorably for the pleader. (*Tahir Erk* v. *Glenn L. Martin Co.* (C. C. A. 4th), 116 F. (2d) 865; *Carroll* v. *Paramount Pictures*, 3 F. R. D. 95.) Pursuing the practice thus sanctioned, greater latitude has been allowed the parties in presenting their claims and defenses.

II.

Jurisdiction of This Court.

It seems scarcely necessary to mention this point since it has been conclusively settled in a long line of cases. For the convenience, rather than for the information, of the Court,

we cite the following expositions of the Court's jurisdiction and a recent illustration of its exercise:

Constitution of the United States, Article III, Section 2; 28 U. S. C. A., Section 341;

Rhode Island v. *Massachusetts*, 12 Pet. (37 U. S.) 657, 9 Law Ed. 1233;

Virginia v. *West Virginia*, 11 Wall. (78 U. S.) 39, 20 Law Ed. 67;

Vermont v. *New Hampshire*, 289 U. S. 593, 53 Sup. Ct. 708, 77 Law Ed. 1392.

III.

The Missouri River.

While not indispensable to a correct understanding of the issues involved, it may not be altogether superfluous to offer a few observations touching the Missouri River in general and more particularly such as bear upon that section of it which constitutes for approximately 128 miles a part of the boundary between the States of Kansas and Missouri.

The Missouri River, a twin fork of the Mississippi, is formed by the confluence of the Jefferson, Madison, and Gallatin rivers at Three Forks, in Southwest Montana. The main head stream from Three Forks to the source, rising just west of Yellowstone National Park, on the crest of the Rocky Mountains, is about 400 miles in length. From Three Forks to the mouth of the river, about fifteen miles above Saint Louis, the Missouri follows a course of about 2,550 miles. Its outstanding characteristics are such as to distinguish it among the great rivers of the world and these characteristics have been variously described by different writers. In *The American Fur Trade of the Far West* by General Hiram M. Chittenden, are to be found numerous

and extended references to the Missouri River, and of these the following extracts may serve as illustrations [1]:

"Both in its physical characteristics and in its eventful history, the Missouri River must be ranked as one of the most remarkable streams upon the globe. Its source is farther from the sea than that of any other, the distance from the head of Red Rock Creek, the upper source of Jefferson Fork, to the Gulf of Mexico being 4,221 miles. * * *

The physical characteristics of the Missouri River over the navigable portion of its length are the same as those of the Lower Mississippi. For nearly the whole distance below Fort Benton it flows through a valley built up from alluvial deposits, with nothing like a hard or rocky bed to hold it in place. The fall is rapid, the current swift, and the soft banks are therefore always undergoing erosion. The shoreline here recedes and there advances as the earth which falls into the stream in one place is dropped in extensive bars in another. At certain seasons this action is rapid and destructive and hundreds of acres in a single locality are frequently washed away in the course of a few days.

The river naturally develops a succession of bends which are often very pronounced. In many instances the opposite portions of these bends approach very close to each other, so that while the river distance around may be several miles, the distance across may be only a few hundred feet. In time this narrow neck is cut through, a large body of land is transferred to the other shore, and the old bend becomes another of those crescent-shaped lakes which abound throughout the valley. Thus the channel of the river is ever migrating from one side of the valley to the other, changing its length, readjusting its slopes, destroying extensive and fertile bottoms, building up new land, and giving rise to never-ending disputes in the ownership and jurisdiction of property. In recent years the govern-

[1] Vol. II, pp. 754, 761-763, edition of 1936.

ment has undertaken to harness this refractory stream, for now that farms and cities line its course, these destructive raids are becoming an evil that must be attended to. The problem, however, is one not easy to solve and it will be generations yet before the river is imprisoned within fixed limits.

A river whose bed is composed of sand or alluvium can not have a clear current. That of the Missouri always has a muddy appearance and in seasons of high water the amount of sediment which it carries is very great. The current has no uniform or regular flow, but is everywhere whirling and boiling in ceaseless internal commotion. The bottom has no stability. It is a mass of moving sand drifts which are building here and washing away there and shifting their position continually. The navigator can never tell where the channel will be twenty-four hours ahead. The constant cutting of banks fills the bed of the river with fallen trees which are drawn along by the powerful current until they become anchored in the bottom, forming the most dangerous obstacles to navigation. These obstacles are called snags and sawyers, or sometimes 'breaks', from the appearance which they produce where they lie a little beneath the surface. They come almost entirely from cottonwood trees.

The newly formed lands along the river bottoms are generally covered with willows which often attain considerable size. Their growth is of astonishing rapidity, and scarcely is a new sand bar formed and uncovered by the water, when the thick tender crop is seen shooting vigorously upward. As these willows are extensively used in regulating works on the river, it seems as if nature, in giving this stream its wild and unruly character, has provided the means ready at hand by which it may be placed under control.

Of all the Western rivers the Missouri was by far the most important to the trader. It would be impossible to estimate the great amount of business that has been transacted upon it, or the strange and unusual

adventures it has witnessed. Its navigation is a science by itself. As a business it has now wholly passed away, but its record will survive as one of the most important chapters in the history of the West."

In his book, *History of Early Steamboat Navigation on the Missouri River*, General Chittenden has two interesting chapters on "The Missouri River", and "Steamboat Navigation on the Missouri River,"[2] which repeat the substance of what has been quoted above from his work on *The American Fur Trade of the Far West*.

Another excellent account of the river is that by Philip E. Chappell in a paper read by him before the Kansas State Historical Society on December 6, 1904, entitled, "A History of the Missouri River."[3] To be appreciated this account should be read in its entirety, but as of possible relevance here, we venture to quote from its pages the following:

"For 200 years the history of the Missouri river has been the history of the country through which it flows, and its influence on its development should not now be underestimated. On its dark bosom the Indian paddled his canoe for centuries before the advent of the white man. Then came the French voyageur and his pirogue, his bateau, his keel-boat, and his mackinaw boat, without which the fur trade, the principal commerce in that day, could not have attained its great proportions. At last came the steamboat, the most wonderful invention of the nineteenth century.

For half a century the Missouri river was the great thoroughfare from the East to the West, and on it floated the travel and commerce of the trans-Mississippi section. No one can now appreciate its importance in the past. Military posts were established that supplies by the river route might be easily ob-

[2] Vol. I, pp. 73-89, 115-122.

[3] Kansas Historical Collections, Vol. IX, pp. 268-269, Topeka, 1906.

tained, and settlements were made with a view to transporting the products of the farm to market on its waters. Capitals of states were located on its banks, that they might be accessible.

Perhaps there is not in the world a more difficult stream to navigate than the Missouri river. The Sieur Hubert was right when, in his report to his government in 1705, he said the birch-bark canoe could not be used to navigate its waters.

The greatest difficulty encountered in navigating the river was caused by constant changes in the shifting of the channel. From the mouth of the Platte to the Mississippi, on each side of the river are bluffs which parallel each other at an average distance of two miles. The channel, except during a flood, is confined to from one-fourth to one-half this distance, leaving the remainder bottom land. This bottom, which is alluvial soil, originally covered with a primeval forest, furnishes a leeway for the channel. It is 'made land,' caused from accretions, and the river has never relinquished its title to it. It may have been thousands of years in forming, but sooner or later the channel, unless restrained, will go back and claim its own. When the channel of the river changes it leaves a sand-bar, which soon becomes overgrown with willows and young cottonwoods. These catch and retain the silt of subsequent overflows, which continually raises the surface of the accretion, until, together with decaying vegetation, it becomes as high as the adjacent land. This process goes on for centuries, and in this way the bottom lands along the Missouri river are continually forming and reforming.

Surveys made along the lower river during the Spanish regime, and even during the early part of the last century, substantiate this statement; but if further evidence is required, let a hole be bored anywhere in the river bottoms, a mile or more from the present bed of the river, and it is probable that at a distance of about twenty-five feet, or when the level of the water in the river is reached, a wrack heap or

an old log will be struck that has laid there embedded in the soil for centuries, thus proving conclusively that the channel of the river at one time flowed there.

The most dangerous localities on the river were the bends, and it was in them that most of the accidents occurred to the steamboats. They were formed in the following manner: The main channel of the river is disposed to follow the bluff shore, and does so until it meets with some obstruction. A trifling object, such as a wrack heap or an old steamboat wreck, will sometimes deflect the current and send it off obliquely to the opposite shore. As the land where it strikes is underlaid with a stratum of white sand, it melts before the strong current as a snow-bank before the noonday's sun. This undermining process goes on at every rise, until in the course of a few years a great bend is formed, thousands of acres of land are swept way, and the channel of the river is a mile or more away from where it formerly ran.

Some of these bends are as much as twenty miles long and have been many years in forming. The land along the shore was originally covered with a dense growth of large timber—cottonwood, elm, walnut, etc. As the banks are undermined these immense trees tumble into the channel and float along the current until their roots, the heaviest part, after dragging awhile, become anchored in the bottom of the river. There they remain for years, some extending above the surface of the water and others beneath and out of sight. The former, from being continuously in motion, caused by the swift current, are called "sawyers." From the velocity of the current, and the innumerable snags, these bends were a continuous menace to steamboats, and no pilot approached one, especially at night, without trepidation and fear."

Allen P. Staver, of the U. S. Engineer's Office of the Kansas City District, a witness on behalf of the complainant herein, gave some interesting testimony about the Missouri River and its physical features and customary

behavior, but for this it will doubtless suffice to refer to the record. (Tr. II, 974-978, 980, 981, 983, 984, 1004-1006, 1022-1026, 1030, 1031.)

In *State of Nebraska* v. *State of Iowa*, 143 U. S. 359, 368, 369, 12 Sup. Ct. 396, 36 Law Ed. 186, 190, this Court, in an opinion by Mr. Justice Brewer, said:

> "The case before us is presented on testimony, and not on allegation. But what are the facts apparent from that testimony? The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely a quicksand. In building the bridge of the Union Pacific Railway Company across the Missouri River, in the vicinity of the tracts in controversy, the builders went down to the solid rock, sixty-five feet below the surface, and there found a pine log a foot and a half in diameter—of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony; that, while there may be an instantaneous and obvious dropping into the river of

quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the 'muddy' Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods of the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from the other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto."

That part of the Missouri River, which separates the States of Kansas and Missouri, extends from the mouth of the Kaw or Kansas River, at the south end, to the Nebraska line or the 40th parallel of north latitude, at the north end of the common boundary, a distance of approximately 128 miles. Between these two terminal points

there are 39 well defined Bends and one Reach, that of Leavenworth, making, on an average, one Bend for every 3⅓ miles of the entire distance. Between the same points there are 40 tributaries or affluents of the river, of which 26 enter from Kansas and 15 enter from Missouri. The principal cities along this stretch of the Missouri are Greater Kansas City, Leavenworth and Atchison, Kansas, and St. Joseph, Missouri.

Collected in a foot-note [4] are references to the writings

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[4] *Original Journals of the Lewis and Clark Expedition, 1804-1806,* ed. by R. G. Thwaites, 8 vols., New York, 1904;

History of the Expedition of Lewis and Clark, etc., ed. by Elliott Coues, 4 vols., New York, 1893;

The Missouri River and Its Utmost Source, by J. V. Brower, St. Paul, Miss., 1897;

Early Notices of the Missouri River and Indians, by John P. Jones, Kansas City Review of Science and Industry, Vol. 5, p. 111;

Journal of a Fur-Trading Expedition on the Upper Missouri, 1812-1813, by John C. Luttig, Missouri Hist. Soc., St. Louis, 1920;

Journals of Meriwether Lewis and John Ordway, 1803-1806, ed. by M. M. Quaife, Madison, Wis., 1916;

Travels in the Interior of America in the years 1809, 1810 and 1811, by John Bradbury, Liverpool, 1817; (2d ed.) London, 1819;

Travels in the Interior of North America, by Maximilian, Prince of Wied, London, 1843;

Views of Louisiana, with Journal of a Voyage up the Missouri River in 1811, by H. M. Brackenridge, Pittsburgh, Pa., 1814;

The Discovery of the Oregon Trail, with Robert Stuart's Narratives, etc., ed. by Philip A. Rollins, New York, 1935;

Tabeau's Narrative of Loisel's Expedition to the Upper Missouri, ed. by Annie H. Abel, Norman, Oklahoma. 1939;

The Ashley-Smith Explorations, by H. C. Dale, Cleveland, Ohio, 1918;

Sources of the History of Oregon, being Correspondence and Journals of Captain Nathaniel J. Wyeth, &c., Eugene, Ore., 1899;

The Travels of Jedediah Smith, etc., ed. by Maurice S. Sullivan, Santa Ana, Cal., 1934;

Expedition to Rocky Mountains under Major Stephen Long, in the years 1817 and 1820, ed. by Edwin James, 2 vols., Philadelphia, 1823;

Journal of an Exploring Tour, etc., by Rev. Samuel Parker, Ithaca, N. Y., 1838;

Atlas of the Historical Geography of the United States, by Paullin and Wright, Washington and New York, 1932;

Atlas of American History, by James Truslow Adams, New York, 1943.

of or about some of the early traders, travelers, and explorers, who navigated the Missouri River and preserved accounts of it, in which mention is made of landmarks between Kansas City and Rulo, Nebraska.

Forbes Bend is the fifth bend in the river south of the Nebraska line, which coincides with the northern boundary of the State of Kansas, and lies between what is known as Wolf Creek Bend above and Mt. Vernon Bend below. Fobes Bend may be further defined as lying between Channel Mileage Stations 510 and 515 (as measured and marked in 1890), or between the mouth of Mosquito Creek at the lower end, in Mt. Vernon Bend, and the mouth of Wolf Creek at the upper end, which marks the junction of Wolf Creek Bend with Forbes Bend. These facts may most readily be gathered from Complainant's Exhibits 30 and 31, File 3, by which it will, also, be seen that the area actually in dispute at Forbes Bend is more accurately limited by Mileage Stations 491 and 495 (as measured and marked in 1932). Within this narrower compass, the extremities of the land in contest are only about four miles apart.

Forbes Bend, moreover, is between Doniphan County, Kansas and Holt County, Missouri, and, more specifically, between Center and (possibly) Iowa and Burr Oak civil or municipal Townships, in Kansas, and Forbes and (possibly) Lewis civil or municipal Townships, in Missouri. The disputed area comprises approximately 2225 acres of land and if it should be held to belong to Kansas it would be in Township 2, South, Range 20, East, in Doniphan County, Kansas, and, on the other hand, if it should be held to belong to Missouri, it would be in Townships 58 and 59, North, Range 38, West, in Holt County, Missouri.

To this Forbes Bend area, as the sole remaining section of the boundary in dispute, it is proper that our attention be now chiefly directed. The rival claims and contentions

of the parties with respect to this area, as set forth in their pleadings, have already been outlined above. We, accordingly, proceed to a consideration and discussion of the evidence appertaining to this particular branch of the entire controversy.

IV.

Discussion of the Evidence.

The evidence, both oral and written, has been thoroughly digested and summarized in the printed briefs filed on behalf of the contending States. As sometimes quite naturally happens, it may be that one side or the other has over-emphasized certain aspects of the evidence supposed to favor the particular propositions sought to be maintained, and, therefore, to the end that the views of the Special Master may, if possible, find adequate support in the record, independently of the presentations of the proof made by learned counsel, an attempt will here be made to abstract and analyze so much of the evidence as is deemed essential to a clear understanding of the conclusions we have reached as well as to a sound and just determination of the issues concerning the boundary at Forbes Bend.

Of the maps and plats in the record pertaining to Forbes Bend that bear dates prior to 1900, there are eleven in all, viz., Resp's. Ex. 25, File 2 (1849), Comp's. Ex. 5, File 1 (1855), Resp's. Ex. 26, File 2 (1877), Resp's. Ex. 4, File 3 (1879), Comp's. Exs. 66 and 67, File 2 (1882), Comp's. Exs. 68 and 69, File 2 (1882), Resp's. Ex. 3, File 3 (1893), and Comp's. Exs. 50 and 51, File 2, (1898).

Of the maps and plats in the record pertaining to Forbes Bend that bear dates after the year 1900, and not later than the year 1928, there are six in all, viz., Comp's. Ex. 52, File 2 (1918), Comp's. Ex. 46, File 5 (1923), Special

Master's Ex. "A", File 1 (1924), Comp's. Ex. 47, File 3 (1926), Comp's. Ex. 102, File 3 (1928), and Comp's. Ex. 133, File 1 (1928).

The older maps or plats mentioned above, *i. e.*, those of 1849, 1855, 1877, 1879, and 1882, throw little clear light upon the conditions existing at these various dates in the Forbes Bend area. The indications of sloughs or chutes and the sand bars or islands or vestiges of islands and sand bars in this area, appearing on these exhibits, suggest the presence of a tendency toward the accumulation of sand and soil in the middle of the river and the formation of shoals, bars or inchoate islands, but indications of such tendency, if it fairly appears, are in no way decisive, though they may presage subsequent developments in the disputed area and be persuasive of the sense in which these developments should be interpreted.

A bare glance at the eleven maps or plats, above referred to, beginning with the year 1849 and ending with the year 1898, and at the six maps or plats, above referred to, beginning with the year 1918, and ending with the year 1928, discloses the fact that for the critical period of twenty years, between 1898 and 1918, there is not a single map or other paper memorial of any kind relating to the course or condition of the river or the disputed land in the Forbes Bend area. If no clear or decisive inference can be drawn from the maps and plats in the record of dates prior to 1900, it is equally evident that for the first real clue to the developments and conditions in the disputed area subsequent to 1900 we must turn to the unofficial Holt County Atlas map of 1918 (Comp's. Ex. 53, File 2), or, more dependably, to the U. S. Engineers' blueprint map (sheets 13 and 14 combined), of July, 1923 (Ccmp's. Ex. 46, File 5), and to the U. S. Geological Survey map of the Oregon Quadrangle of 1924 (edition of 1926, Special Master's Ex.

"A", File 1), which together reflect the then existing conditions. These two maps of 1923 and 1924 are usefully supplemented by the later map of November 9, 1926, (a revision from airplane photographs, by U. S. Engineers, Sheet No. 46, Comp's. Ex. 47, File 3), and that of November 23, 1928 (a revision from airplane photographs, by U. S. Engineers, Sheet No. 46, Comp's. Ex. 102, File 3). These two later maps of 1926 and 1928 do not show any very material change from the conditions revealed by the maps of 1923 and 1924, and the surface or aerial maps in the record, of a date in or subsequent to 1928, merely serve to bring the recognizable picture of the prevalent conditions up to date. Whether these other maps of 1928 or of some later date show the channel or flow of the river along the northernmost erosion bank on the Missouri side still open or practically closed is of no significance in solving the primary question as to whether the main navigable channel of the river ever reached and followed, for any appreciable or determinate length of time, a course along that farthest erosion bank. The evidence on both sides tends to show that the inroads of the river on the Missouri side eventually ceased and that gradually over a period of years from 1923 or 1924, or at all events, from 1928 onward, all active chutes or channels of any consequence on the Missouri side had, for all practical purposes, filled in and closed up. If the main channel ever reached and held the course contended for by Complainant, of course such restoration of the land on the Missouri side would not impair or prejudice its rights, and, on the other hand, if no such radical change in the main channel ever occurred, then it makes no difference in the rights of the Respondent whether the chutes and channels, cut by the river through Missouri territory, remained indefinitely open and more or less active or did, in fact, over a period of years, gradually cease flowing and their beds become stagnant, dry or filled up.

Since, for the crucial period of twenty-five years, from 1898 to 1923, with the single exception of the unofficial and indecisive Holt County Atlas Map of 1918 (Comp's. Ex. 52, File 2), there are absolutely no surveys, maps, plats or other documentary proofs of any kind in the record to enlighten us as to what took place in Forbes Bend during that period, we are of necessity remitted to the oral evidence of the witnesses who testified from memory concerning this matter for the respective parties. This testimony, insofar as material, bears upon two pivotal features of the situation, viz. (1) the emergence and existence of a bar, or island in the river, and, (2) the development of a divided channel or of two contemporaneously flowing channels in the river at Forbes Bend. These two features, being virtually inseparable, will be discussed together.

Island Formation and Divided Flow.

That a large bar or island did form in the river would seem from the evidence to be incontestable. As previously suggested, the slight evidence derivable from the maps and plats originating in and prior to the year 1898 show a proclivity or tendency on the part of the river in the Forbes Bend area to form bars or small islands. That such bars or islands were actually produced subsequent to 1898 is fully established by witnesses on both sides of the case. Without encumbering this report with excessive quotations from the Transcript, it will doubtless suffice to give the following samplings from the proof both as to island formations and a plurality of channels.

Howell E. Geiger (Tr. I, 112), referring to Engineers' Map of July 23, 1923 (Comp's. Ex. 46, File 5, filed Tr. I, 91), says there is superimposed on this map the 1890 river bank lines, the 1890 river mileage, "and also an island."

This "island" of 1890 is again mentioned by this witness (Tr. I, 118, 119, 126).

Pardee Dyer (Tr. I, 198), says "there was some bar land in there" (in 1917), though he locates it on the Kansas side of the river and says it did not form as an island (Tr. I, 198, 199). Later (Tr. I, 206, 207), he says that before the ice jam of 1917, there were one or two channels there, "three or four little different chutes," through which the water flowed. They weren't very large, "just probably deep enough to run a boat up through sometimes. Would call them little channels. In the summer time, when the water got up there, they were big, deep channels, almost rivers, but in the fall of the year, when it would go down, they wouldn't be very deep." After 1917, he says there was an island out there, but is unable to state the size of it (Tr. I, 213). Dyer does not claim any land north or east of the river as it now flows (Tr. I, 217, 227).

Clara Dyer says that in 1914, the river "run on the Kansas side" (Tr. I, 234).

Nettie Martin testified (Tr. I, 251), "As I remember, the channel came down—there was kind of two, you know, but it kept more on the Kansas side, the main channel did," that the river "never moved away from the Kansas bluff"; mentions "two channels of the river being divided," and says, "that was when the main channel come down, it kind of divided, but the one on the other (Missouri) side kind of went dry and that throwed it more on the Kansas side when it went through" (Tr. I, 251, 252).

George Pridgeon states (Tr. I, 262, 263), that, between 1900 and 1913, the river seemed to form bar land. Willows and cottonwoods grew up in the river bed, out in the bar or river bed. During the thirteen years from 1900 to 1913, the channel of the river "seemed to go east on the Missouri side," might say half a mile. On the Kansas bank "there were still sloughs through there." Again he said (Tr. I,

265), "I do know that there is more bar land lower down south from where we used to live [at the Cole place], to my estimation, than there is above."

Esta Surles (a sister of George Pridgeon), who lived at or near Lafayette from about 1900 to 1913 or 1914, says (Tr. I, 270), "It (the river) made a big bar in there," that the Kansas bank was overflowing and filling up, "we called them 'sloughs'. There was a big slough between our house and the barn that you couldn't get across. Had water in it the biggest part of the year" (Tr. I, 271).

W. M. Daviess says the channel of the river, opposite Lafayette, at the time he left there in 1902, "was right along the bluff" (Tr. I, 275). He speaks of sand bars in the river (Tr. I, 276).

Kenneth Brownlee first visited the vicinity of Lafayette about 1906, at which time the course or channel of the river "was right along the Kansas bank," *i. e.* the bluff line on the Kansas side (Tr. I, 284). In 1921, when he revisited the same locality, the course or channel of the river had changed at Lafayette—"a big bar throwed in there at Lafayette—about three-quarters of a mile wide" (Tr. I, 285, 286). Says in 1921 the course or channel of the river was just about evenly divided—about as much on one side of this bar as there was on the other. There were two channels out there. There was a divided flow of the river at that point in 1921. There were two channels down through there; "There was more on the Missouri side than there was on the Kansas side" (Tr. I, 288-290). "There was land between these two channels in 1921," and from 1921 until 1923 (Tr. I, 291, 292). While fishing in the river in 1921 and 1923, water was flowing on both sides of this bar (Tr. I, 293, 294). After that this Missouri chute gradually commenced to fill up, and, at the same time, more water gradualy went through the Kansas chute. "There was

always water along that Kansas branch there—never did see it dry. * * * There have always been chutes across this bar * * * a small one in the center of that bar has been there for a long time" (Tr. I, 294, 295).

Judge C. W. Ryan states that he has known the Lafayette locality on the Missouri River since 1906 (Tr. I, 299). His father, S. L. Ryan, lived at Lafayette several years after 1906, but Judge Ryan himself never lived there. He has managed the farm since his father's death, May 29, 1921, and owns an undivided one-fifth (1/5) interest in it (Tr. I, 300.) The 100 acres of "shore land" purchased in 1906 by Judge Ryan's father consisted of bluff and accretions, but, he says, there were really no accretions to it then. There was, in 1906, a little low bar just starting to form in front of the place. It hadn't really risen to the dignity of accretion yet (Tr. I, 301). Entire river frontage of his father's farm was three-quarters (¾) of a mile or more (Tr. I, 302). "In 1906," he says, "at the time my father bought the land (at Lafayette), the river hugged right along the bluff there" (Tr. I, 304). The river changed or began to change its flow or course opposite Ryan farm at Lafayette, in 1906—that change was just starting in 1907; "the accretions were never stable there." Describes formation and size of bar (Tr. I, 307-309). After 1914, the river made out to the north and northeast, and reached its farthest point toward the Burlington Railroad tracks in 1928, but the main channel was not along the left bank in 1928. During the years he has known the farm at Lafayette, there have been two channels of the river at that point—two are the most there ever were. "There would be chutes through this disputed accretions that water would flow through at times of high water. Those chutes were constantly changing." Remembers a divided flow out there, but is not positive as to time he first saw it, whether early in 1917, or two years later, in 1919 (Tr. I, 311-313). The witness describes the two chan-

nels (Tr. I, 313-315). Says there was an island there—"that made an island when it cut through this cut-off channel." It was 1,800 to 2,000 acres in size (Tr. I, 315, 316). After he first saw the divided flow, the channel on the Kansas side of the island underwent change, which the witness describes (Tr. I, 318, 319). Compares the width of the northernmost channel and the "cut-off" channel (Tr. I, 319, 320). Says the river moved during all the years talked about (*i. e.* 1907 to 1927), and Kansas land expanded "by slow, gradual and imperceptible accretion to the Kansas bank, just the same as all the accretion land makes along that river." This matter and the spread of the Kansas accreted land for three or three and a half miles (later estimated, Tr. I, 336, 340, 341, at two and a half miles at widest point through a limited area,) in solid, unbroken continuity, during the two decades, 1907, 1927, is canvassed with the witness pretty thoroughly (Tr. I, 321-324). But, he says, "After the channel divided (and this may have happened in 1917 or earlier), the river cut in and took quite a lot, kept eating Cole's mainland until it got almost to the bluff, just left a narrow fringe there by his house" (Tr. I, 325). He says "The cut-off channel from 1917 or '19, whichever it was, that I first knew it, continued the divided channel until about 1931, and then that was practically shut up. There wasn't much water in the northernmost channel after 1928. It dried up very rapidly." Earl A. Cole bought the farm next above the Ryans, and Dyer's land comes next above Cole's (Tr. I, 327-328). Mr. Cole came there about 1921 (Tr. I, 332). Judge Ryan says that, before 1931, he did not cultivate any of the accretions "up where the island was" (Tr. I, 337); that, after the river divided its flow in 1917 or 1919, from that time on there was always a channel or stream along the Kansas side (Tr. I, 341), and that the Missouri branch commenced to fill up in 1928, filled very rapidly after that, a great deal of it was

done in 1928, and the filling up was practically completed by 1931, *i. e.* in 3 to 4 years (Tr. I, 342, 343).

John H. Peret, an engineer and surveyor of Holt County, Missouri, 62 years of age, introduced as a witness by complainant, testified that "from 1906 to 1917, the Missouri River in the vicinity of Forbes Bend was cutting back nearly every year * * * until it cut back to the line I show as 'Erosion bank line,' on map surveyed by him (Tr. I, 370, 371, and Comp's. Ex. 55, File 1). He explains the movement and action of the river water in the formation of bars and the bar actually formed in Forbes Bend (Tr. I, 371-374). Describing the appearance of the several pools or sluices of water across the sand-bar in the river, he says (Tr. I, 374)—"Those sloughs are just like the fingers and thumbs of your hands." This figure is also used by Complainant's witness, E. A. Cole, who, in speaking of the Island in Forbes Bend, said—"it was just full of little fingers, like, you know, little chutes" (Tr. I, 386). Another witness, R. L. Greene, testified (Tr. II, 764), "Well, you know, the river was divided and it just scattered out there and I wouldn't want to say which channel was the widest, just like your fingers going down through there in four places through that bottom. I wouldn't pretend to say which one was the deepest or the widest."

Earl A. Cole moved to Forbes Bend in 1921 (Tr. I, 377). He indicates on the aerial map of April, 1941 (Comp's. Ex. 56, File 5, the location of his home by marking the spot "C" in red pencil (Tr. I, 379). He shows on the same map the banks or shore-lines of the river on the Kansas side by marking a blue line across the map from near the mouth of Wolf River (Tr. I, 382-385). He says there was more than one channel of the river in 1921, but can't give the number of channels definitely (Tr. I, 385). The course or channel changed after 1921, the river kept creeping north and east, the Kansas channel moved to the north (Tr. I, 386, 387).

"The river kept eating on the Missouri side and this sand-bar kept heading out on this (*i. e.* the Kansas) side" (Tr. I, 389). The witness puts a second blue line on the map (Comp's. Ex. 56, File 5), to indicate the Missouri channel as he thinks it was in 1921, and, in the same connection, he tells about the island in their. This island in 1921, when Mr. Cole moved there, was "two miles long and about a half mile wide, maybe a little wider than that" (Tr. I, 390, 391). He indicates on the same map the place and description of the Missouri channel in 1923 by the symbols "X-1923", in red pencil, placed at two points on the map and by the symbols, "Y-1923," placed at the third point (Tr. I, 391). Cole says the river receded toward the south after 1923 a distance of one inch or one and a half inches on this aerial map—"It left a nice little flat in there—Mr. Jamieson built his house on that flat, which was about 500 feet wide. * * * That was in 1928" (Tr. I, 393). By the symbols "X-1928," he indicates a point about 500 feet or so from the Burlington Railroad tracks finally reached by the river (Tr. I, 393-395). Mr. Cole himself was not living on this land of his "during those years," *i. e.* 1921 to 1928; but he "had men out there" and "was over there almost once a week, and sometimes two or three times a week" (Tr. I, 395). He says "I observed that this sand-bar here kept building out and the river would be wider in places and then narrower, and it was very irregular, and there was a lot of little rivulets going through it all the time" (Tr. I, 390). He repeats that, in 1921, there was a divided flow of the river, and that, in his opinion, this divided flow never ceased until now that "most of it is on the Kansas side"—"in fact, I believe it all is there. In 1928 it dried up very rapidly over there" (Tr. I, 401). He tells more of the sand-bars in the river in 1926 and 1927 (Tr. I, 402, 403).

John Kotsch (Tr. I, 412-414), has known Forbes Bend area since 1900. In that year this river ran right next

to the bluff, right next to the old Kunkle house (at Lafayette). After 1905, he observed river making changes in its course. Down the river we owned what they called "Kotsch Island"; that was the east line of Center Township. There was accreted or "bar" land north of the Cole property and some on the Ryan place. Witness has known two channels, one called a slough (Tr. I, 416). Says the river "gradually went to the north and northeast" and returned where it now is "gradually" (Tr. I, 416, 418).

John Coufal says that, in 1929, three-fourths of the river was on the Missouri side and about one-fourth was on the Kansas side, "going around that bar" (Tr. I, 420). He testified:

> "Q. Was there an island in between the two channels there?
> "A. Yes, sir.
> "Q. How large was that island?
> "A. About two miles long and about a mile wide.
> "Q. Did you farm any part of that Island when you went there?
> "A. Yes, sir. About 70 or 80 acres of it."

He says an ice jam formed on March 8, 1929, the ice jammed at the northwest end of this Island and forced most of the river back over to Kansas. This ice jam piled up high on the head end of this bar (Tr. I, 421-425, and 428). The ice jam he saw in March, 1929, is indicated by the letters "X-I.J.", in blue pencil, on the U. S. Engineer's Aerial Survey Map of September 17, 1930 (Comp's. Ex. 48, File 3). At this time there was a channel on both the Missouri and the Kansas sides of the bar or island (Tr. I, 430-432). There had been a channel on the Kansas side long before the ice jam was ever formed in March, 1929; a considerable channel but "not as much as on the Missouri side" (Tr. I, 432, 433).

Mrs. John Coufal remembers an ice jam of March 7, 1929, which, she says, was in the Kansas branch of the river, and "There was always water in that Kansas side of the stream * * * as long as I can remember"; there was an island in there and one had to cross the main part of the river to get over to the Island (Tr. I, 436-439).

Earle A. Cole, recalled, states he saw the ice jam of March, 1929, and that "There was water flowing down the Kansas channel or Kansas side of the stream prior to March, 1929" (Tr. I, 441, 443). Before the ice jam, the channel on Missouri side "had a lot of low sand-bars in it over there, and that is why the ice piled up first (Tr. I, 445).

William Leach testified (Tr. I, 450), that "In 1903, the river ran right along the Kansas bluff."

John H. Simpson, from 1904 to 1908, lived on 40 acres of land, belong to the Ryan place. He was raised at Lafayette and, when he was a boy, the river came in right along the bluff on the Kansas side (Tr. I, 451). River had begun to leave the Kansas bank in 1904—was out, possibly, 150 or 200 yards. During ensuing four years, the river continued to move out from the bank—400 or 500 yards—"just gradually went out" toward the northeast (Tr. 452, 453). Mr. Simpson says the river had a divided flow, the Kansas channel was narrower, Missouri channel was wider, the main channel; and "after the channel was divided, it continued to stay divided" (Tr. I, 455-457).

Raymond Elmer Simpson says that, in 1918, "practically all the river was on this side", *i. e.*, the Kansas side. There was an island there in 1918. He repeats that, in 1918, "the south one, the Kansas channel, was the largest, much the largest." First noticed a divided channel in 1917 or 1918, and that when he returned from Military Service in May, 1918," practically all the river was over here",*i. e.*, on the Kansas side.

Paul Bottinger, a County Commissioner of Doniphan County, Kansas, was duck hunting around Forbes Bend in 1911-1913. Says the main river in 1912 and 1913 flowed northeast (Tr. I, 478, 479). He returned to the river in 1919 or 1920; then noticed a great change; there was a strong current for 500 or 600 feet through where hunters had their tent in 1911 and 1912; had to take a boat to go across. He also noticed a flow north and east of "bar land"—it was a good mile across to this other channel. "Most of the water was coming through the Kansas side in 1920" (Tr. I, 480).

Francis A. Holton, Jr. was first in the vicinity of Forbes Bend in 1896 or 1897. He then left that neighborhood and came back about 1912. Hunted ducks on the Ryan and Cole places. Continued to go there until about 1917. After that he returned about 1922. There was a chute there then through Cole's place—it ran into the main river down next to Ryan's. He continued to go down there from 1922 to 1928 or 1930. The last time he was there the river was flowing on both sides, the Missouri channel being the heaviest. This was around 1929 or 1930 (Tr. I, 481-483). He tells about logging timber off of the river land of Mr. Cole (Tr. I, 483, 484, 489, 490). Holton noticed a divided flow after he came back from the army—the chute was then about 200 yards wide at the largest place (Tr. I, 486, 487).

Charles Baskins testified that, in 1898, or "about 1900," the channel of the river "scrubbed right along the banks of Lafayette," on the Kansas side; that the channel did not change "for several years," that it changed between 1913 and 1914, and in 1913, '14, "we didn't have no water there much." Afterwards, maybe 1917, "we changed channels by a big break up of ice on the chute" (Tr. I, 493-495). These statements are repeated or amplified (Tr. I, 496), and he has much to say about an ice jam in 1917 and its apparent effect on the flow of the river, which thereafter

llowed a split or divided channel, and had two channels
om 1917 on (Tr. I, 497, 499).

George Atkison lived at Lafayette from 1926 to 1934.
ys that, in 1926, "There was two rivers there; what we
lled the main river was on the Missouri side at that time.
• • The boats followed the main river" (Tr. I, 510,
1). "The island in that area was from 2 miles, between
ose two channels." During the eight years he was there,
e river changed its course, "the channel came back into
is second chute" (Tr. I, 511). Saw one boat going up
issouri channel in 1926; saw none go up after that; saw
ats go up the Kansas side from that time on (Tr. I, 513).
tween the two arms of the river were land and sand-bars—
ver saw "this island" covered with water or entirely sub-
erged (Tr. I, 516, 517).

John E. Simpson states that, in 1905, the main channel
vas mostly under the bluff on the Kansas side," "the main
annel then ran close to the Kansas bluff;" this river "was
ided there a while; then it all went to Missouri, the water
went on the Missouri side" (Tr. I, 520, 521). The di-
ded flow began "somewheres around 1912 or '13" (Tr.
521). Several times mentions the bar or "Island", (Tr.
522, 523, 524, 525). He says that after the ice jam of 1917,
ere were two channels in the place of one—apparently
eaning two in place of one toward the south or Kansas side
the island, across which the newest (third) channel passed
r. I, 525, 526). With this, however, and as a check upon
should be compared his further statements at pages 528
d 529 of the Transcript, Volume I.

Oron McKay has known the Lafayette locality in Forbes
nd since 1915. He visited there on down to 1920, with the
ception of the winter of 1918. In 1915, the river "took
to Missouri and around what is called the center bar
w" (Tr. I, 530). In 1915 and '16, the river "had one

channel and after '17, it had two" (Tr. I, 532-534). Says, "It was one river in '16 (Tr. I, 534).

Isaac Muse says, in 1900, the channel was close to Lafayette, close to the Kansas bluff. The channel afterwards moved out north toward Missouri (Tr. I, 539, 540). The first formation was "just a white sand-bar." Willows grew up and it kept filling in there. River had moved some by 1912 to the north and east. After 1912, the river changed, kept going to north and east. "It gradually cut off on the Missouri side and built on the land toward Kansas" (Tr. I, 540, 541). There was a divided flow out there opposite the Cole house; "I know the river went on each side of that island." Says, " I suppose it is an island; it was a bar that laid there in the river" (Tr. I, 542, 543). Water was on both sides of it. It (the island) was in there for years. Water was on both sides of it in 1900 (Tr. I, 544).

Joseph McKay says when he first noticed the river, "there was a large sand-bar in front of our place there"; was separated by a slough. In later years the river had a divided flow (Tr. I, 546, 547, 550).

C. B. Caton first became acquainted with the river from Wolf Creek to Lafayette in 1914. Says "when the government put the dikes in in 1921, that forced the main channel of the river to the north"; before that "it was hugging the Kansas side pretty well (Tr. I, 555, 557, 558).

Clyde McWilliams says river had been gradually working towards the Missouri side ever since he could remember; that "the river came right in at the mouth of Wolf River and then shot across toward the Missouri side and cut in where I used to live. * * * and then it worked to the Kansas side and what was known as the Cole place. * * * There was a slough. A branch of the old Missouri run around between the Dyer land and the Cole land; whenever the river would get up, why, it would come around

ugh there. (Tr. I, 567). The river stopped moving to Missouri side around 1925 (Tr. I, 570). In 1934 there a divided flow and an Island—"That was practically ays the case somewhere along in that vicinity" (Tr. I, . There were two channels, said the witness, who ed:

"I know we used to watch the steamboats and sometimes, some year maybe, they would go up on one side pretty strong, and the next year maybe they would be farther to the Kansas side. My recollection of the Missouri River is that it varied from time to time, from one year to another" (Tr. I, 573).

e describes what he calls "Dyer Island" (Tr. I, 574,), and says, (Tr. I, 576), the channel was split up, here was a bar out in the middle of the river across n the Dyer tract of land. * * * That divided the nnel at that point for a number of years." The river adually worked from the Kansas side to the Missouri for a great many years, since I can first remember, il '24 or '25." He then mentions "Jamieson Bar," says the river "has worked back a mile or more to the nsas side there in the last few years"—worked gradually . I, 577, 578). Mr. McWilliams says all changes in the r in the Forbes Bend vicinity have been gradual and he explains at length the island formation there (Tr. 82-584).

The next two witnesses for the complainant, Kenneth inson and Joseph H. Gray, are passed for later conration.

William Prusman testified that when the river cut into ssouri, "It throwed in a bar out there; there was a small nnel on the other side" (Tr. I, 616).

John F. McDonough used a rowboat on the river when re were more channels than one. One time he went

up over the Missouri side and came back on the Kansas side. Couldn't see any difference in the channels as to width. Couldn't give the size of the Island, but says it took quite a while to pass around it. There was vegetation on the Island, which remained there practically as it was (Tr. I, 624-626).

Wm. R. Hatch lived on the Cole farm about 1928 or '29. Cleared 4 or 5 acres of timber land. "The main channel run down through there. It was practically where it is now, when I moved there." There was another channel, "on the Island, that little chute going through there." On the other side of the Island there were just chutes. There was water running by Mill Creek—when the river was up, the water would around it (Tr. I, 628, 629). These direct questions and answers then occur (Tr. I, 629):

"Q. Was there an island down there?
"A. Yes, a big one.
"Q. How big was it?
"A. Well, about 2,000 acres."

There were some willows and cottonwoods on the Island—"the cottonwoods were fairly good size"—from 6 inches to 8 inches through (Tr. I, 630).

Louis F. Stalcup says he visited his grandfather, who lived in Buffalo Hollow, on the Kansas side of the river, about 1900, and by that time "it had commenced kind of making a bar out from the bluff" (Tr. I, 635). "From 1900 to about 1928, it (the river) cut in three, three and a half miles" (Tr. I, 636). He says "It has been cutting all my life until the Government taken it over. * * * In the winter-time when it is frozen up and the river is low, it doesn't do much cutting. Most generally in the spring and summer. * * * It never did cut so awfully much when it was so terribly high" (Tr. I, 637, 638). Mr. Stalcup says there was more than one channel out there in 1910 or '11.

"At that time you could stand on the Missouri side and see two channels coming down each side of this island." He can't say when there ceased being two channels or when the channel closed, if it ever closed on the Kansas side. The closing on the Missouri side was gradual. "There was always a chute down through there." The island never has disappeared (Tr. I, 640-645). The witness says:

> "I was on this island the other day over there and bought some calves, and I was on the same land that I stood there and watched this island back in 1910" (Tr. I, 646).

George Larson, Sheriff of Doniphan County, Kansas, has known the land in Kansas, along the Missouri River, from Wolf River to Mosquito Creek, since 1926, when he used to hunt ducks at Pardee Dyer's. Of the locality he says—"There was a bar out there, but I don't know how far it went," it was a quarter-mile wide; "there was a chute flowing through there." It was pretty wide when the river was up, and one had to row or paddle a boat through there in low water. Witness hunted on this bar. Grass and willows and young cottonwoods were growing on it (Tr. I, 655, 656). He describes the chute between Dyer's and Cole's, which he says "extended plumb down the river" and, when he went across to the bar in 1930 or 1931, "it was a mile or further wide" (Tr. I, 657, 658).

Clifford Coufal lived on the Cole land in 1929. Says there was then a kind of chute that ran between the Island and the Missouri side. On the Kansas side was just a small chute, with some current, and a boat was used to cross it. He saw ice jams at the head end of the bar, *i. e.* "the head end of the Island where the river forked to Kansas and Missouri" (Tr. I, 673, 674). He repeats (Tr. I, 678). "That land was an Island there at that time," *i. e.* at time of the ice jam in March, 1929.

A. F. Hays refers (Tr. I, 682), to a high ridge of white sand, between 4 and 5 miles long—"don't think that particular ridge ever did change. It was never submerged to my knowledge." "There was water running along both sides of the bar"—"this chute that run down through there was full of small bars. You had to be a pretty good navigator in order to get through there without hitting some bar" (Tr. I, 684). "There were a lot of chutes running across this bar" (Tr. I, 687). Saw an ice jam there in 1920—"It completely dammed both chutes" (Tr. I, 688). "The one I saw was on the Missouri side because the river was so wide there at that time and the water was so shallow with all the bars in it that that is what caused it to block" (Tr. I, 689). "It was shallow on both sides." He indicates by a blue check mark (√) on map (U. S. Eng. Map of Nov. 9, 1926, Comp's. Ex. 47, File 3), where ice jam formed, right out from Pardee Dyer's. This ice jam was in the spring, February or March, between 1920 and 1926 (Tr. I, 690, 691). It was five or six feet high above the bars—"Those were all flat bars and the ice just protruded out on these bars, pushed out on it" (Tr. I, 691).

John B. Gray states that, in 1922, when he first became acquainted with this locality, "the flow of the river was divided in that vicinity." The river flowed near the Kansas side on one branch and near the Missouri side on the other." He says the Missouri branch began to fill up in 1927 or 1928. More flow then went through the Kansas branch. The government put a dike in to stop it. "That was a gradual process" (Tr. II, 700, 702).

Dave Barbour, a witness for respondent, indicates on the Missouri River Commission Map of 1893, based in part on a topographical survey of 1879 (Resp's Ex. 3, File 3), by the symbols "B-1904", in violet colored pencil, an island in the river (Tr. II, 731). He says the river had a divided flow, beginning along about 1903, and it continued to flow on

both sides of the bar until 1928 or 1929 (Tr. II, 731, 732). He further says, "Any time from 1902 on up, as long as I have known it, there has been plenty of water on the south side of the island" (Tr. II, 734). Is pretty sure the channel had a divided flow in 1914, "a little bit on the north side of the island, and quite a lot of channel on the south side" (Tr. II, 739). He has much to say about the Island in the river (Tr. II, 740-742), and asserts that, when the water got within one-quarter to one-half mile of the Burlington Railroad tracks, that was not the main flow of the river at that time; that was along from 1924 to 1929 (Tr. II, 742). Again he says that, between 1921 and 1924 "we figured the main channel of the river was south of the Island" (Tr. II, 743).

R. L. Greene, 72 years of age, testified that the river in Forbes Bend flows now about where it did in 1900 (Tr. II, 753, 754). He tells about the sandy bar that became an island, and says the river flowed (as was to be expected) on both sides of the Island (Tr. II, 755, 756). He then makes this highly significant statement—"In my estimation, there wasn't but one river bed. I might be biased, but I think the river is about where it has always been now. • • • It just spread out all over that whole bottom in there for several years" (Tr. II, 757). Mr. Greene further says there never was a time since he has known the river, that there wasn't a flow of water on the south side or Kansas channel of the river (Tr. II, 760).

Carl Harrison, 60 years of age, says the river was doing its main cutting in 1914 and three or four years afterwards around that bend. The flow was divided in 1914. Had awful high water in 1921—"It looked like a big lake over on the north side, the water did" (Tr. II, 767). From about 1920 on, the south or Kansas branch of the river began to get larger all the time—seemed like it was gradual.

There was always water and a channel on the Kansas side since 1914 (Tr. II, 768).

Clarence Harper speaks of a divided flow of the river about 1915 and says there was always a substantial flow on the Kansas side (Tr. II, 770). He describes this double or divided flow around the bar, and says, "There were two main channels; then there were these chutes that went across there, two or three of them" (Tr. II, 770, 774, 779).

Bryan Hudgins says in 1903, the river ran close to the Kansas hill, and, in 1907 or '08, the river began cutting (Tr. II, 799, 800). He believes the "erosion of the Missouri land ended along about 1920". Flow of the river was divided for a period of years. He first observed an Island in July, 1916. It was formed west of Baker School house around 1914 or '15, and the river was then divided about 50-50. Has seen steamboats go up both sides (Tr. II, 800-802). "There was always a substantial flow of the water on the Kansas side at the time it was divided. * * * Never noticed any sudden change in the channel of either the north branch or the south branch of the river" (Tr. II, 803). "The island formed in there, to the best of my knowledge, the lower end, around 1914." Before 1914, the river ran on the Kansas side. From 1914 onward, the flow of the river divided—"there was water on both sides" (Tr. II, 805). "The island enlarged about the rate the river was going" (Tr. II, 808).

Ed McCoy testified that, when he first knew the river, "it flowed just about where it does now, next to the Kansas bluff." It commenced to cut in the bottoms in 1915, cut right up there where the Jamieson Bar is. There was quite a bit of flow on both sides of the Island at that time. In 1923, there was an island or bar in the river as represented on this map (*i. e.* U. S. Engineer's Map of July, 1923, Comp's Ex. 46, File 5), and the water continued to flow in divided channels for some time. The Missouri or north

channel began to close up along about 1922 or '23 (Tr. II, 816-818). In the high water of June, 1921, the river "got over all the island—the whole thing" (Tr. II, 819). Never saw the river when there wasn't any water on the Kansas side or south side of Jamieson Bar. Saw boats go up and down there (Tr. II, 820).

Avon H. Murray, having his attention called to the U. S. Engineers' Map of July, 1923 (Comp's Ex. 46, File 5), says the flow of the river was partly divided in 1915: "there was a small island out in the river" (Tr. II, 827).

Murray says the river continued cutting to the east and north until 1922 or 1923; thinks it stopped cutting in 1923. Says there was always a channel on both sides of the bar (Tr. II, 829, 830). The water gradually changed back to the Kansas side. The small island mentioned was south of Mill Creek (Tr. II, 831, 832).

John Guyer says the river flowed down the Kansas side until it began cutting back onto the Missouri side, "along about 1910, somewheres along in there" at the southwest end of the Mill Creek bar. The bar was formed there when the river began to cut on the Missouri side. During those years there was always a channel on the Kansas side of the bar. Mill Creek "comes down around the old bar where the river used to come down around" (Tr. II, 835-838). The river had a divided flow from Wolf River on down from 1910; also, had a divided flow in 1922 or '23 (Tr. II, 840, 841).

Ralph Dyer first knew river in 1909 when it flowed on Kansas side. Says the river did its worst cutting on the Missouri side from 1914 to 1923. It cut on around and formed Jamieson's Bar. The flow of the river was divided about 1913 or '14,—"There seemed to be an island out there in the center of the river along about Lafayette down there; there seemed to be an island in there that split the channel at that time" (Tr. II, 843). "There was just about as much

water on one side as there was on the other when it split there * * * a half mile of water on each side." The Missouri channel began to fill up about 1923 or '24 (Tr. II, 844). The river did not eat out the island in there (Tr. II, 847). Took a number of years—ten years in all—for the river "to fill back there" (Tr. II, 846).

James Fitzgerald says the river was divided and flowed in two channels; it cut into Missouri and formed Jamieson Island. There was no sudden change in 1917. (Tr. II, 852, 854.)

Harvey H. Hall says he first knew the river in 1916, and it was then on the Kansas side. The flow of the river was divided by an island in the middle of the river. (Tr. II, 862, 863.) He says there was no sudden change in the river in 1917. (Tr. II, 866.)

William Metcalfe, 65 years of age, first knew the river in the Forbes Bend locality in 1886, and the river at that time, he says, was "mostly on the Kansas side and there was an island out there then." Noticed a divided flow of the river in 1916. The channel on the Missouri side weakened after 1917. There was no sudden change in 1917. (Tr. II, 875-877.)

Ed Cotton, 81 years old, says there were two channels, one up the Missouri side and one up the Kansas side. The channel always has been on the Kansas side. (Tr. II, 889, 890.)

Verde Harrison testified that in 1914 there was a divided channel and the river was over on the Kansas side. In 1928, the channel was all on the Kansas side. He noticed no sudden change between 1914 and 1921. (Tr. II, 892, 893.)

Raymond Dyer says the river in 1914 was pretty much on the Kansas side. In 1917, 1918, or 1919, he observed a divided flow. There was always a channel on the Kansas side. Never noticed any sudden change in the river. (Tr.

II, 898-900.) Describes the Island as containing 2500 or 2600 acres. (Tr. II, 904.)

The testimony of Mrs. Murel Dyer, wife of Raymond Dyer, substantially agrees with that of her husband. (Tr. II, 909-915.) The testimony of Clarence Dinwiddie (Tr. II, 919-927) is largely to the same effect.

John Frazier, aged 71, has lived in the vicinity of Wolf River since 1875. He describes formation of bar below mouth of Wolf River and the Schaeffer Bar in particular, which was slightly upstream from mouth of Wolf River. (Tr. II, 928-935.)

Clate Schaeffer said he had lived right on the Missouri River all his life. In Forbes Bend it always had a divided flow "till it cut our place in." Little Tarkio Creek and Squaw Creek were the same, "before they ditched it out." He places the letters "X-S", in red pencil, on the Engineers' Aerial Survey Map of September 17, 1930 (Comp's. Ex. 48, File 3), to show where he lived. He mentions a divided flow—two channels or two chutes—and says he never knew a time when there was no water on the Kansas side. (Tr. II, 935-944.)

Mrs. Edna Schaeffer's testimony is cumulative along the lines of that given by the witness, Clate Schaeffer. (Tr. II, 945-952.)

W. L. Moore became acquainted with the river in 1906, '07, or '08; he hunted on the river upstream from 1908 to 1912; bought apples in that area. During those years the river was over by the Kansas bluff. He locates Shirley Lane on Comp's. Ex. 53, File 2 (a plat from the Holt County Atlas of 1918), marking it with the letter "X" in blue pencil, but later it is indicated by red lines running east and west between Sections 25 and 36. (Compare evidence of Lloyd A. Dankers, Tr. II, 964, 965.) In 1918 or 1919, according to this witness, a snag boat got stuck and

had to go up the Kansas channel. He never knew a time when there wasn't a channel on the Kansas side. The river had a divided flow in 1917 and 1918. (Tr. II, 954-962.)

From the combined testimony of the more than 50 witnesses, whose relevant statements have here been abstracted, it is plain enough that there was a bar or island and a divided flow of the river in the Forbes Bend section at all the times material to this controversy. Considering this oral evidence in the light of the surveys and maps relating to Forbes Bend, which are in the record, it also appears fairly evident that the entire cycle of the changes in Forbes Bend, with which we are concerned here, had run its course within a period of about eighteen years, from about 1900 to 1917, '18, or from about 1905-'06 to 1923-'24. What may have happened between 1924 and 1941 with respect to the flow of the stream, the filling up or drying up of what is called "the Missouri channel", and the restoration of the firm land on the east or Missouri side of the river to the condition it was in before the river started out on its foray, is of consequence only as showing or tending to show that the process by which the river expanded between 1906 and 1924 was virtually duplicated as it contracted and receded to its original location between 1924 and 1941.

This view of the situation, of course, eliminates the alleged ice jam of 1927, 1928 or 1929 as a factor of any importance, yet, to clear the way for the determination which is to follow, a little time may be spent in considering the alleged ice jam of 1917-'18 as a possible avulsive factor of importance.

Ice Jam of 1917-'18.

Allen P. Staver, an Assistant Engineer in the U. S. Engineers' office in Kansas City, Mo., who has been on duty there since March, 1929 (Tr. II, 974), but was never over

the river continuously as a whole, in the Kansas City District, until about 1932 (Tr. II, 1013), says that ice jams frequently occur in the Missouri River but their magnitude varies considerably and he expresses the opinion that they may affect the flow and change the course of the river, although he had never made any personal observation of such matters and could only speak from information based on records in his office. (Tr. II, 1003, 1004.)

There are some four witnesses to the alleged ice jam of 1917-'18, claimed to have caused an avulsion, to-wit: Pardee Dyer (Tr. I, 203-210), Clara Dyer (Tr. I, 238), Charles Baskins (Tr. I, 493-499), and John E. Simpson (Tr. I, 521, 524-526).

That there was such an ice jam there is no reason to doubt, but that it caused such an avulsion as is claimed for it by complainant is far from clear. Certain natural conditions and the characteristic behavior of the river did unquestionably bring about a progressive diversion in the flow of the river and the emergence of a large bar or island in Forbes Bend, and these developments may have been stimulated or accelerated by this ice jam of 1917 or 1918. But the evidence completely fails to show that this ice jam or any other physical force or factor operating in 1917 or 1918, had the effect or tendency of directing the flow from Missouri to Kansas. Unless we grievously misapprehend the evidence, this ice jam of 1917, if it had any direct influence at all on the flow of the river, quickened and aggravated the inroads of the river into Missouri instead of throwing the greater volume of water more and more toward Kansas. In other words, if there were any avulsive changes of the river during the period in question, those changes, in the opinion of the Special Master, were adverse to the interests of Missouri rather than to those of Kansas. (See *Wiltse* v. *Bolton,* 132 Neb. 354; 272 N. W. 197.)

The ice jam of 1927, 1928, or 1929, while more amply attested than that of 1917 or 1918, does not, in our opinion, materially affect the problem for two reasons, one that the main channel prior thereto was already on the Kansas side of the intervening island, and, in any event, this ice jam seems to have had no avulsive effect on the flow of the water down the Missouri channel. It may have reduced the flow somewhat and have set in motion or promoted a gradual subsidence of that flow, with a like gradual filling up of the shrinking Missouri channel, but it cannot be said that it caused any avulsive changes whatever. Evidence to that effect is nebulous if not non-existent. The variations in the direction and depth of the flow of the river came from causes more subtle and yet more potent than a single solitary ice jam of comparatively brief duration and of wholly uncertain extent. It has often been observed that such variations in channel location and depth are not unusual in rivers, like the Missouri, carrying large amounts of silt and sand. Manifestly, it is not easy in the light of the confused, inconsistent and conflicting testimony, to determine with absolute or even with unshakable moral certainty that a particular channel at any given time was a main channel rather than a minor one; nor is it easy to determine with entire assurance whether any particular change in the river's course was or was not of an avulsive nature.

In *Oklahoma* v. *Texas*, 260 U. S. 606, 638; 43 Sup. Ct. 221; 67 Law Ed. 248, this Court has seemed to hold that the party asserting an avulsive change has the burden of proof. Thus, in that case, it is said:

> "Common exeprience suggests that there probably have been changes in this stretch of the Red River since 1921, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. Some

changes are shown here and conceded. Others are asserted on one side and denied on the other."

A corollary of this rule would seem to be that where, here, it is agreed or demonstrated that the river had certain position in one year, *e. g.*, 1900 or 1906, and other position in a subsequent year, *e. g.*, 1918 or 1923, ere is a presumption that it reached its later position accretive change, unless it is proved that the change s caused by avulsion, and such avulsion must be estabhed affirmatively by definite evidence and cannot be in-rred from the general habits of the river or from what e might consider the greater probabilities. There is clear direct evidence of a violent avulsive change to e north and east, nor, as already stated, do we find any fficient evidence of any such sudden, visible, and violent ange back to the south and west. Whether, within the ace of forty years, from 1901 to 1941, the river moved one direction or the other, we should have to conclude at such shiftings were of an accretive and not of an ulsive nature, although, as Dr. Joseph Bowman, the emint physiographer, now President of Johns Hopkins Unirsity, has pointed out, accretive and avulsive processes ay sometimes operate conjointly at one and the same time. *The Geog. Review*, April, 1923, Vol. XIII, p. 169.)

What differentiates the problem here from the ordinary mple case of a slow change by erosion and accretion, or om the equally simple case of an abrupt change by viot cataclysmic avulsion, is that the evidence discloses ither a palpable case of change by accretion nor an insputable case of change by avulsion. From some cause other, and by some means or other, the channel of the issouri River in Forbes Bend was divided, and the two anches of the divided channel flowed around the bar or and which separated them. Before this island came

definitely into existence the main channel of the river was admittedly to the south and west of it, and, therefore, the emerging island was presumably on the Missouri side of the river and within Missouri territory. The evidence is not all one way by any means, but at least it may be said with a certain degree of confidence that complainant has failed to show that the main channel at this point ever really deserted the course to the west and south, next to the Kansas Bluff. Even if it were not so, the fact that the bar or island in the bend was, in its inception, on the Missouri side of the main channel and hence a Missouri island would, we think, effectually deprive the State of Kansas of any valid or enforceable claim to it, and the boundary between the two states retained its place coincident with the medial-line of the principal navigable channel flowing along the southern or westerly side of the island and between that island and the Kansas mainland.

V.

Discussion of Law in Its Application to the Evidence.

Complainant's Exhibit 1, File 4, (Tr. I, 30,) is a certified copy of Section 1 of the organic Act, passed by the National Congress, providing for the admission of Kansas into the Union, and, also, a certified copy of a Joint Resolution of the Legislature of Kansas accepting the terms imposed by Congress upon the admission of Kansas into the Union. By said Act of Admission, which was approved and took effect on January 29, 1861, (12 U. S. Stats. at Large, 126, Chap. XX,) it was provided that—

> "The said state shall consist of all the territory included within the following boundaries, to-wit:
>
> "Beginning at a point on the western boundary of the State of Missouri, where the thirty-seventh parallel

north latitude crosses the same; thence west on said
rallel to the twenty-fifth meridian of longitude west
om Washington; thence north on said meridian to
e fortieth parallel of latitude; thence east on said par-
lel to the western boundary of the State of Missouri;
ence south with the western boundary of said State
the place of beginning."

omparison it will be seen that this description is al-
iterally identical with that in the preamble to the
s Constitution of 1859, framed by a convention held
andotte in July, 1859, and ratified by a vote of the
in October, 1859. (Charters and Constitutions of
ited States, Part I, pp. 629, 630, Government Print-
ice, Washington, 1878.)

n these enactments it is plain that the eastern bound-
Kansas is dependent upon and to be determined
"Western boundary of the State of Missouri."

ondent's Exhibit 1, File 4, (Tr. I, 30,) is a certified
f Article I of the Constitution of Missouri, at the
f her admission into the Union on August 10, 1821.
'onstitution was framed by a convention which met
nt Louis June 12, 1820, and completed its labors July
0. The description of the State boundaries, insofar
tinent here, set out in Article I of this Constitution
0, was as follows:

"Beginning in the middle of the Mississippi River,
the parallel of thirty-six degrees of north latitude;
ence west &c. * * * thence west along the same to
point where the said parallel (of thirty-six degrees
nd thirty minutes) is intersected by a meridian-line
ssing through the middle of the mouth of the Kansas
iver, where the same empties into the Missouri River;
ence from the point aforesaid north, along the said
eridian-line to the intersection of the parallel of lati-
de which passes through the rapids of the River Des

Moines, &c. * * * thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof to the place of beginning." Constitutions and Chapters of the United States, Part II pp. 1104, 1105, Government Printing Office, Washington, 1878.

This description follows the language of Section 2 of the Enabling Act of Congress, approved March 6, 1820. (3 U. S. Stats. at Large, 545-548, Chap. XXII.)

As is apparent from the above, the western boundary of the State of Missouri, for its entire distance, originally followed a meridian-line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River. As nearly as we have been able to ascertain it, this meridian of longitude is 94° 40′ west of Greenwich, though this may not be strictly true for the year 1821. This meridian-line, as it was on August 10, 1821, still marks the western boundary of Missouri from its southwestern corner north to the mouth of the Kaw or Kansas River. Beyond this point the western boundary of Missouri was altered by certain subsequent events, attended by parallel legislative action. The various steps in the process are rehearsed by Mr. Justice Holmes in his opinion for this Court in the case of *Missouri* v. *Kansas*, 213 U. S. 78; 29 Sup. Ct. 417; 53 Law Ed. 706, decided in 1909, as, also, by Mr. Justice Harlan in the earlier case of *Missouri* v. *Nebraska*, 196 U. S. 23; 25 Sup. Ct. 155; 49 Law Ed. 372. It all resulted in the purchase and extinguishment by Congress of the Indian title or claim of title to all lands lying east of the Missouri River, north of the mouth of the Kansas River, and west of the meridian line originally marking the western boundary of Missouri, and the annexation or inclusion of all of this area, which came to be

known as the "Platte Purchase," within the territorial bounds of the State of Missouri.[5]

In anticipation of the action of Congress looking to the extinguishment of the Indian title to the tract of land above mentioned, the State Constitution of Missouri was amended by the Legislature of that State, under authority of the provisions of Article XII of said instrument, at its regular consecutive sessions held in the years 1834 and 1835. By this amendment, which was later designated as Section 4, of Article II, of the several State Constitutional Amendments, it was declared:

> "That the boundary of the State be so altered and extended as to include all that tract of land lying on the north side of the Missouri River, and west of the present boundary of this State, so that the same shall be bounded on the south by the middle of the main channel of the Missouri River, and on the north by the present northern boundary line of the State, as established by the Constitution, when the same is continued in a right line to the west, or to include so much of said tract of land as Congress may assent." (Resp's. Ex. 2, File 4, Tr. I, 31; Charters and Constitutions of the United States, Part II, pp. 1119, 1120, Government Printing Office, Washington, 1878.)

As was previsioned in the Constitutional Amendment just quoted, the Congress passed an Act, approved June 7, 1836, to extend the western boundary of the State of Missouri to the Missouri River. By this act it was provided:

> "That when the Indian title to all the lands lying between the State of Missouri and the Missouri River

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[5] *The Platte Purchase*, by John Doniphan, in Encyc. of History of Missouri, Vol. I, pp. 151-155, St. Louis, 1901;
The Platte Purchase, by Wm. E. Spratt, St. Joseph, Mo. 1918;
The Platte Purchase, by Dorothy A. Neuhoff, Washington University Studies, Vol. XI, pp. 307-346, St. Louis, 1924;
The Platte Purchase, by Howard I. McKee, Missouri Hist. Review, Vol. XXXII, pp. 129-147, Columbia, Mo., January, 1938.

shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said State shall be then extended to the Missouri River, reserving to the United States the original right of the soil in said lands, and of disposing of the same: Provided, That this act shall not take effect until the President shall, by proclamation, declare that the Indian title to said lands has been extinguished; nor shall it take effect until the State of Missouri shall have assented to the provisions of this act." (5 U. S. Stats. at Large, 34, Chap. LXXXVI.)

By an Act of December 16, 1836, (Mo. Laws, 9th Genl. Assem., 1st session, p. 28,) the General Assembly of the State of Missouri expressed the assent of said State to the provisions of the Act of Congress of June 7, 1836, and, under date of March 28, 1837, President Martin Van Buren issued his Proclamation, announcing such assent by the State of Missouri, and declaring, "that the Indian title to all the said lands lying between the State of Missouri and the Missouri River has been extinguished, and that the said Act of Congress of the 7th of June, 1836, takes effect from the date hereof." (5 U. S. Stats. at Large, 802, Appendix No. I.)

These several enactments make it reasonably clear that, since March 28, 1837, the Missouri River from the middle of the mouth of the Kaw, where the same empties into the Missouri, and along the middle of the main channel of said river, to its intersection with the parallel of latitude constituting the northern boundary of Missouri, has constituted the western boundary of the State of Missouri, and, so far as the 40th parallel of north latitude, the eastern boundary of the State of Kansas. This seems to be the import of the decisions rendered in the two cases of *Missouri* v. *Kansas* and *Missouri* v. *Nebraska*, cited *supra*.

It is unnecessary, however, to labor the point or to cite further authorities in support of it, since the parties here

are agreed that the Missouri River, as it flowed on January 29, 1861, the time when the State of Kansas was admitted to the Union, was then established as the common dividing boundary between the States of Kansas and Missouri, (paragraph II of Bill and Answer,) and this boundary is treated as coinciding with "the center of the stream," (paragraph VI of Bill,) or "in center of the main channel of said stream", (paragraph VI of Answer.)

While it is nowhere alleged in the pleadings, it is a matter of common knowledge and undisputed that the Missouri River is a navigable stream and the parties have proceeded throughout upon this assumption. (See *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 182; 10 Sup. Ct. 518; 33 Law Ed. 872, 875.) They are also agreed in their recognition and acceptance of the rule that, when a navigable river constitutes the boundary between two independent states, the line defining the boundary is the middle of the main navigable channel of the stream. (Brief for Complainant, pp. 175, 187.) This thread of the stream or medial line is sometimes given the technical name of *thalweg*. (*Iowa* v. *Illinois*, 147 U. S., 1; 13 Sup. Ct., 239; 37 Law Ed., 55.) But the navigability of any given channel has always weighed heavily in determining whether or not it shall be regarded as the main channel, the middle whereof shall be denominated the line of demarcation and boundary. This Court has phrased the composite idea in the words, "that the *thalweg*, or middle of the navigable channel, is to be taken as the true boundary line between independent states." (*Iowa* v. *Illinois*, *supra*; *Arkansas* v. *Tennessee*, 246 U. S., 158; 38 Sup. Ct. 301; 62 Law Ed., 638.)

The pleadings and arguments have brought into prominence the laws of accretion and avulsion. Insofar as these principles are concerned, there is no difference in either conception or enunciation on the part of opposing counsel. Of the great mass of legal literature dealing with the sub-

ject, it will, perhaps, suffice to quote only what this Court has said in the above-cited case of *Arkansas* v. *Tennessee*, as follows:

> "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel." (Citing precedents.)

But, to repeat the words used by the Court in this same case of *Arkansas* v. *Tennessee*, "there is controversy with respect to the application of the foregoing rule to the particular circumstances of this case." The rule is simple but its practical application is not always easy. In the case at bar there is evidence of widespread erosion, some evidence of accretion, and some slight evidence of avulsive action, but the problem is complicated by other significant factors which enter into it. As the proof conclusively shows, there were bar or island formations in the bed of the river at Forbes Bend; there was a split channel or a pair of channels at that place; and of these channels it becomes necessary to decide which one is fairly entitled to be pronounced the main navigable channel. In view of these facts, it is obvious that very slight considerations may serve, in fact must serve, to tilt the scales one way rather than the other.

To begin with, it is admitted by counsel for complainant that for nearly forty years, if not longer, the Missouri River, in Forbes Bend, flowed continuously and without

interruption next or close to the Kansas bluffs. (Tr. I, 176; Tr. III, 1459, 1460.) The main navigable channel during the whole of this period, from 1861 to 1900, or thereabouts, was on the Kansas side of the river. There were no islands or bars of consequence on that side of the river—indeed, there was no room for such bars or islands between the river and the bluffs. In the absence of positive evidence to the contrary, the legal presumption is that such conditions in the river remained stationary or substantially so. "Proof of the existence of a fact or condition at a particular time within reasonable limits gives rise to the inference that it continues to exist, in the absence of proof to the contrary. 22 C. J. 86." (*City of Cape Girardeau* v. *Hunze*, 314 Mo. 438; 284 S. W. 471; 47 A. L. R. 25; *In re Paul*, 14 Fed. (2d) 703.)

This principle obviously places the burden of proof upon the complainant, and that it rests upon complainant here is thus stated in 11 C. J. S., (topic "Boundaries,") p. 698, Sec. 104:

> "The burden of establishing a change in the boundary of property is on the claimant, and so the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature."

Cases supporting this text are *State* v. *Muncie Pulp Co.*, 119 Tenn., 47; 104 S. W. 437, 456; *In re East River Drive, Borough of Manhattan, City of New York*, 289 N. Y. Supp. 433; *Wyckoff* v. *Mayfield*, 130 Ore. 687; 280 Pac. 340; *Shapleigh* v. *United Farms Co.*, 100 Fed. (2d) 287, (C. C. A. 5th); and in *Oklahoma* v. *Texas*, 260 U. S. 606; 43 Sup. Ct., 221; 67 Law Ed. 428, as previously quoted, it was said:

> "Common experience suggests that there probably have been changes in this stretch of the Red River since 1821, but they cannot be merely conjectured. The

party asserting material changes should carry the burden of proving them, whether they be recent or old."

Bearing in mind the trend of the testimony touching the emergence of bar or island formations and the coincident development of two or more channels in Forbes Bend, it seems to be incumbent upon us to lay hold of some modifications or qualifications of the general rules governing accretion and avulsion and the normal effect of these processes upon water-course boundaries, in order correctly to determine the rights of the parties to this controversy. Before undertaking this part of our task, however, it may not be amiss to remind the Court once more of the fact that the only tangible and authentic contemporaneous evidence of the conditions in Forbes Bend subsequent to the year 1898, when the main navigable channel of the river was still "hugging" the Kansas bluffs or mainland, that we have in the record, is the U. S. Engineer's Map of July, 1923, (Comp's. Ex. 46, File 5,) which may advantageously be examined and studied in connection with the U. S. Geological Survey Map of the Oregon Quadrangle of 1924, (Special Master's Exhibit "A", File 1.) Helpful sidelights upon these two maps are to be obtained from the statements of two or three witnesses for the Complainant, whose testimony has been reserved for presentation at this point. The first of these witnesses is Kenneth Robinson, (Tr. I, 588-601), who, after explaining that he was 50 years of age and had been acquainted with the Forbes Bend area since 1922, testified, in part, as follows, with the Questions and Answers reduced to narrative form:

"That he engaged in hunting on that portion of the river from what has been referred to as Mosquito or Skeeter Creek up river to and beyond, to some extent, Wolf River. That, at the time he first started hunting on the Missouri river it flowed as follows—Starting at the mouth of Wolf River, the (Missouri) river flowed

for a mile or thereabouts, even a little north of east, almost directly east to a sudden abrupt right angle bend—in 1922 and some subsequent years—where it turned and at that time flowed generally east, gradually curving to the south until it passed completely around the large, very large, bar, a bar rather than an island at that point, say a mile up river from Skeeter Creek. As of 1922 and '23, the left bank of the Missouri River was a quarter to a half mile from the Burlington Railroad tracks on the Missouri. In 1922 there was more than one channel in the river. At that time the channel of the river divided at the upper end of what has been spoken of as the Dyer Bar, a point, perhaps, three-quarters of a mile to a mile below the mouth of Wolf River, and a minor channel, which we speak of as a chute, definitely not a major channel of the river, flowed around the Kansas or south side of the so-called Dyer Bar and again joined the main channel of the river at a point about a mile above Skeeter Creek. The channel on the Missouri side, in its flow around this bar, varied from an average of half a mile in width. The south channel, at one particular point, was as narrow as 100 feet. Boats, at that time, frequently plied the river and, so far as he observed them, they were all in the north channel. About 1927 or '28 or thereabouts, the north channel of the river changed its course and moved to the south. At a point about half way around the north side of the Dyer Bar it started moving to the south, cutting into the north side of what is referred to as the Dyer Bar, and moved an appreciable distance within two or three years, in part, cutting clear across a portion of this bar, and left a non-flowing body of water on it, where the north channel of the river previously had been. Nothing of moment happened to the south channel which did not then change its course or increase in size or flow. It did increase later, in 1934 or '35, when the Government started working on the river."

This witness was then shown Complainant's Exhibit 47, File 3, which is Sheet No. 40 of the U. S. Engineer's Map of

November 9, 1926, being a revision from airplane photographs, and he gave further testimony with respect to it (Tr. I, 592-596,) which can best be understood and appreciated when read in connection with said map. This map of November 9, 1926, (Complainant's Exhibit 47,) is not only important in and of itself but such importance is heightened when it is carefully considered in connection with Complainant's Exhibit 46, File 5, and Complainant's Exhibits 48 and 49, File 3, and Complainant's Exhibit 56, File 5. These several exhibits, taken together, furnish what is, perhaps, the best picture or reflection of Forbes Bend and its immediate vicinity from 1923 to 1941, and provide the most trustworthy means for determining what took place there throughout those years and brought about the situation existing today.

On cross-examination, the witness, Kenneth Robinson, further testified (Tr. I, 597-601) as follows:

> "In 1922 there was a flow on the east side, designated by the parallel red lines (on Complainant's Exhibit 47), and the flow on the Kansas side, designated by the blue lines. That flow continued to be divided and the water flowed down the channel designated by the blue lines, referred to as the Kansas chute, from 1922 to 1937 or '38. The flow down what is designated the Missouri chute must have ceased entirely about 1930. The flow in the Missouri chute was gradually diminishing over a period of two or three years. This middle chute designated in red (on Complainant's Exhibit 47) became what is now substantially the main channel of the river. As that became the main channel of the river there, the blue chute on the Kansas side and the red chute on the Missouri side gradually disappeared, except that the drying up of the flow of water on the Kansas side was to a considerable extent undoubtedly due to the revetment work done by the United States Engineering Department. Revetment work forced the water out through this middle chute. As

the Missouri chute dried up, the Kansas chute got larger, definitely so at one time, and the chute through the middle of the bar is getting larger all the time too. There were quite a few chutes down the bar, starting out just like your fingers and they varied from year to year according to the flow of the water. He observed the river in the fall of the year or from September 15th to December 31st of each year. The river kind of spread out from the blue line to the red line, with chutes up and down and bars in between. Gradually the Missouri chute commenced to fill up where it is marked "Lake", but the thing that shot the river over was a tendency for this area where Mill Creek or Mill Creek drainage ditch enters the Missouri, to close up. Something caused the flow of water in the Missouri arm of the river to become shut off, so that this was a non-flowing body of water for a period of two or three years."

Joseph H. Gray, who hunted on the river with Kenneth Robinson, testified as to his knowledge of the river at Forbes Bend in substance as follows (Tr. I, 602-614):

"He and Mr. Robinson started hunting on the Missouri River first in 1919, and in 1921 they were hunting at the mouth of Mosquito Creek, which is down the river below the Ryan or Lafayette farm. He and Robinson changed their location on the river in 1921. Moved a house they had built on the Kansas bank of the river up the river to Pardee Dyer's farm in a motor boat they used to hunt with. Before doing so they explored the river in that new locality. When they left Mosquito Creek to go up the river to look for a place to hunt, they first went through what they called the Kansas chute. It was a small stream of water that ran from a little above Mr. Dyer's farm and joined the main river about a half mile above the mouth of Mosquito Creek. We had a great difficulty in getting through there with our boat, an inboard motor boat, which required about a foot of water to operate. They explored the other channel of the river about the same time. In 1922 the

river ran from the mouth of Wolf River northeast, more east than north, in almost a straight line to within about a half a mile of the Burlington Railroad tracks, where it turned and went almost directly south. It then went against the bluff about a half a mile north of Mosquito Creek on the Kansas side. In 1922 over the course described that was approximately five-sixths of the river. It was about a half a mile wide. The other one-sixth of the river passed through the chute on the Kansas side. To move hunting cabin, took it to pieces and moved the parts and the equipment on the motor boat. Its first location was at the mouth of Mosquito Creek. Its next location was on Pardee Dyer's farm. It was about 300 yards down from where the Kansas chute started. The land between the Kansas chute and the Missouri channel was an ordinary river bar with heavy growths of willows, a lot of driftwood on it, cottonwoods also growing on it. Some cottonwood trees on that bar at that time were probably six to eight inches in diameter. The bar at that time would be more than two miles long and approximately a mile wide. The river kept cutting in toward our cabin and we had to move it several times. It is now about a quarter of a mile nearer the bluff than where they originally located it on the Dyer farm. In 1922, the course of the Missouri river did not change materially at this point, but in about 1924 or '25, this Kansas chute became even smaller; and in the winter time it would get so low that it completely would go dry after the freeze would come, and naturally, when the water would get a little higher, it would run through this chute again. Then, in about 1927 or '28, the water began running through this chute and it widened and the river on the north side of the bar gradually filled up and finally stopped running. That was about 1928, maybe later, when it was entirely stopped up. From 1928 to this present time, the principal volume of water flows southeasterly from their hunting cabin in the lower half through the Kansas chute. Of the bar or land between the channel of the Missouri River and the Kansas chute, a part entirely disappeared but the

main portion of it, the large portion of it where Cole's farm and all that part is opposite, it did not disappear. During the years after 1921 that he hunted and fished in this section of the river, he noticed that some of the bar land was in cultivation and that there was a barn on this land near the eastern center part of this big bar, and there were fences and livestock and a plow on this bar. That was shortly after 1928 or '29, when we hunted geese in the middle of this bar. The bar, between the Missouri channel and the Kansas chute, had formed to a height as high as the bank on Mr. Dyer's farm above the level of the river. The reason for this statement is that the witness (Joseph H. Gray) was over this territory in a boat when the water was level with the edge of Mr. Dyer's farm, when they had extremely high water, and there was still a part of that bar out in the water."

On cross-examination this witness further testified (Tr. I, 608-614) with particular reference to Complainant's Exhibit 47, File 3, and his statements for the most part agreed with and confirmed what the previous witness, Kenneth Robinson, had said about it, though his recollection differed somewhat from that of Mr. Robinson as to the location of the so-called "middle chute" between the blue Kansas channel and the red Missouri channel, as indicated on this map by Mr. Robinson.

He says "the filling up process of the Missouri branch of the river started in about 1927 or '28, along about that time. There was no flow of water around the Missouri side, at a normal low stage of the river, in about 1931, maybe. Mill Creek, however, still flows down in that vicinity today, and carries some water with it. The chute (indicated by the witness by a series of parallel dotted or dashed lines on Complainant's Exhibit 47), began to open up at about the same time that the river closed on the north side, from 1928 to '31,—took it quite a while to make that change. As the north bank or the Missouri bank gradually closed up

or filled up, the chute above indicated gradually opened up. This process extended over a period of three or four years from 1928. This chute came into the Kansas chute as indicated by the witness on Complainant's Exhibit 47 with red lines and the letter "X" where the middle chute ran into the Kansas chute. This happened as the north river was closing and the chute was opening in the period from 1928 to 1931. During that period the blue Kansas channel was flowing also. It did not cease to flow until the Government drove piling in it. After the Government drove piling in the Kansas chute, they established a channel along approximately the line indicated as the middle chute—nearly the same direction. They forced it over a little farther and closed the Kansas chute entirely. At the time it was closed, there was a great deal of water running through the Kansas chute. The water running through the middle channel was approximately equally divided with that in the Kansas channel, sometimes one and sometimes the other way, they would vary. The north channel or Missouri channel had then ceased to carry any water. Just before they closed the Kansas chute, boats were going up that chute and using it. No use by boats was made of the middle chute. It was not quite as deep as what was known as the Kansas chute, that is, prior to the time that the Government put the piling in there. After the Government put the piling in, the tendency then was for the water to slow up through the Kansas chute and to go through the middle chute. This middle chute today represents approximately the present location of the Missouri River, but the middle chute, after it had formed of its own accord, was pushed out a little by the Government and it also gradually went out some of its own accord."

The testimony of Complainant's witness, A. F. Hays (Tr. I, 680-692), fits in with and substantially corroborates the testimony of Kenneth Robinson and Joseph H. Gray which has been set out above.

A study of this evidence, in connection with the several maps filed by the Complainant as Exhibits 46 and 56, File 5, and Exhibits 47, 48, and 49, File 3, gives as clear a mental picture as can be gleaned from the record of what actually went on in Forbes Bend between 1920 and 1932. The U. S. Engineer's Map of July, 1923 (Comp's. Ex. 46, File 5), as interpreted by the associate engineer, Howell E. Geiger, of the Kansas City office of the Engineering branch of the War Department (Tr. I, 111-132), affords a solid, substantial, scientific basis for visualizing the actual physical conditions in Forbes Bend in July, 1923, and also serves as a check upon the statements of Messrs. Robinon, Gray, Hays, and other witnesses. Taken in its entirety, this evidence fails to sustain the claim of the Complainant that all "made land" to the north and east of the original channel next to the Kansas bluffs and extending to the farthest left erosion bank of the Missouri River (Comp's. Ex. 55, File 1 and Comp's. Ex. 58, File 5), had accreted to the fast permanent mainland of Kansas along the right bank of the river. The erosive operation of the river wearing against the banks on the Missouri side of the stream is proved beyond all question. But simultaneous accretion of a substantially equal mass of material to the Kansas bank is not shown. There undoubtedly was some accretion to the Kansas side and much of it still remains, as may be seen by a glance at exhibits such as Comp's. Ex. 30, File 3, Comp's. Ex. 56, File 5, Comp's. Ex. 56-A, File 4, and Comp's. Ex. 56-B, File 3. This permanently accreted land is fairly well described and defined by the expert witness, Allen P. Staver, in connection with the revised Engineer's Map of May 8, 1936, Comp's. Ex. 49, File 3. (See Tr. II, 987-1003, 1011, 1012, 1015-1017.)

Judging by the evidence, considered as a whole, it may or may not be true that the principal flow of the river in

Forbes Bend, at some time between 1920 and 1928, was on the Missouri side of the big bar or island in the river, and near to the left erosion bank on that side of the waterway, but, in any case, such heavy flow in that channel could hardly have lasted for any considerable length of time. The only piece of evidence in the record that sheds light on the depths of the water in the Forbes Bend area throughout the entire period under investigation is the U. S. Engineer's Map of July, 1923. (Comp's. Ex. 46, File 5.) The soundings shown on this map do, in places, indicate greater depths in the Missouri channel, but as discounting this we have from Howell E. Geiger, the Engineer who testified particularly concerning this map (Tr. I, 112-132), the following statements in answer to questions by the Special Master:

"Q. Where is the channel, the mid-channel of the river shown on this map as of July, 1923, otherwise than by these soundings which you have indicated, anywhere by any symbol or mark?

"A. It isn't marked. The main channel isn't marked; just the depths are shown.

"Q. That must be figured out by selecting what would apparently be the deepest soundings, is that true?

"A. That is true.

"Q. Does the mid-channel always coincide with the deepest part of the river?

"A. No, sir.

"Q. How, then, are we to ascertain where the mid-channel was?

"A. Continuous greater depth should be followed.

"Q. Well, suppose we don't have that? Suppose we reach a point where you don't have continuous greatest depth?

"A. I don't think we would reach the point, Your Honor, because it must be continuous, I mean continu-

ous main depths of that vicinity. Some places we might have 38." (Tr. I, 122, 123.)

This same witness further testified as follows:

"Q. Does this map indicate that there was a channel on the Kansas side at this time? Can you tell by your soundings there?

"A. Yes, sir, it indicates that you had pretty good water on that side too. (Tr. I, 128.)

"Q. How shallow would a channel be before it could be considered unsafe for river travel?

"A. Well, that would depend upon the width. You would adhere to 100 feet and a minimum of 100 feet, and a depth of 6 feet, if it was a steady 6 feet, would be considered sufficient depth. It is owing to your draft and owing to your load. First they started with a 6-foot channel, and owing to heavier loads and heavier drafts, they are trying to arrive at a 9-foot channel.

"Q. What depth channel was considered safe in '23 when this map was made?

"A. Well, I would judge 4 feet during those days would be ample.

"Q. So this channel through this route next to Kansas could have been used at that time for river traffic?

"A. It could have been used on July 5th, yes, sir." (Tr. I, 131, 132.)

From this and other evidence in the record, it is apparent that in July, 1923, when actual soundings were taken of the depths of the two channels of the river in Forbes Bend, at various intervals, as indicated on Complainant's Exhibit 46, File 5, each of said channels was easily navigable by boats of any size or draft then using the Missouri River. There was, indeed, little to choose between them, except, perhaps, that the Kansas channel was shorter and more direct, (Tr. I, 128,) and, for this reason, might not inaccurately be described as the main navigable channel.

The following testimony by the expert witness, Allen P. Staver, is also worthy of notice in this connection:

> "Q. What is the draft of the Government Inspection boat, Sergeant Floyd, if you are able to say?
> "A. About four feet.
> "Q. What is the extreme draft of any boats or water craft using the Missouri River between Kansas City and Rulo, Nebraska, at the present time?
> "A. There are none that I recall that draw over four or four and a half feet." (Tr., II, 1377, 1378.)

Farmers, public officials, mail-carriers, teachers, engineers, photographers, surveyors, duck-hunters, fishermen, woodsmen, field-hands, men and women, old, young and middle-aged, of all walks of life have testified in this case, but no steamboat captain, engineer or pilot or other experienced river man was ever produced to tell what he might know about the channels or the practical navigation of the river in Forbes Bend or anywhere else in that vicinity. Where the conditions and the progressive changes and transformations in those conditions were, at best, ambiguous and obscure, it may be that the evidence of one or more practical river men, with personal and protracted experience of actual boat operations and traffic on the river, would have gone far to clear up many dubious points touching the matters in controversy, if such evidence could have been secured. For the want of such expert evidence it becomes necessary more and more to rely for guidance upon settled rules of interpretation. Thus in seeking to determine the location of the main navigable channel, it is safest to heed the warning given in *Minnesota* v. *Wisconsin*, 252 U. S. 273, 282; 40 Sup. Ct. 313; 64 Law Ed. 558, 564:

> "The doctrine of thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each

state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

To this sound doctrine may be added what was said by this Court in *Arkansas* v. *Tennessee*, 269 U. S. 152, 157; 46 Sup. Ct. 31; 70 Law Ed. 206, 208, as follows:

"The standard demanded is not applicable. The thing to be done must be regarded. It is to locate the boundary along that portion of the bed of the river that was left dry as a result of the avulsion, according to the middle of the main navigable channel at the time that the current ceased to flow therein as a result of the avulsion. Absolute accuracy is not attainable. A degree of certainty that is reasonable as a practical matter, having regard to the circumstances, is all that is required. The line of the greatest depth of water is not necessarily the middle of the channel. Minnesota v. Wisconsin, 252 U. S. 273, 282, 64 L. Ed. 558, 564, 40 Sup. Ct. Rep. 313. The location, limits and width of the main navigable channel were not precisely defined or permanent. The determination of its location involved more than mere measurements and required the exercise of judgment based on experience. The degree of accuracy insisted on is not reasonable or practicable."

See, also, *Veatch* v. *White*, 23 Fed. (2d) 69, 70, (C. C. A., 9th.)

But even if it were true that at some time and for some appreciable length of time between the outside limits marking the period here under consideration the main navigable and navigated channel in Forbes Bend followed in general the left erosion bank on the Missouri side of the river, yet this fact by itself is not enough to settle the question of boundary at that place between the two States. To this conclusion we have been irresistibly driven by a number of considerations which we shall proceed to state.

The evidence as a whole falls short of showing that the main river moved gradually, by a slow and imperceptible process of coincident erosion and accretion, from its original channel next or near to the base of the Kansas bluffs or foot-hills, for two or three miles all the way north and east across the intervening bottomlands of Missouri to what is described in the record as the left bank erosion line, which, at the farthest reach of its arc, approached to within a quarter of a mile or so of the Burlington Railroad tracks. No consistent and convincing picture of such a gradual and steady invasion of Missouri land by the river can be gleaned or fashioned from the more or less confused and conflicting versions of what happened as detailed in the record. On the contrary, while here and there one may encounter fragments of testimony which favor the superficial and simpler view of the situation, the trend and weight of the evidence fairly demonstrate that the actual course of events was far different and more complex and that a diversity of factors combined to produce the shiftings and changes and ultimate effects now to be seen in the disputed area. The jig-saw puzzle, in other words, does not piece together with the niceness and exactitude contended for by Complainant. If it is permissible for Complainant to rely on the firmly settled doctrine of accretion to justify its claim to these bottom lands in Missouri, it would seem equally allowable for Respondent to do the same in vindication of

asserted right to a reclamation of the same lands. The
ocess, more or less obscure, by which the waters of the
ving river reached the farthest erosion bank to the north
d east, would seem to have been precisely the process by
ich they returned to the main channel where they are
nd today. But, as already suggested, the law of simple
cretion does not provide the key to the vagaries of this
orthodox and unpredictable river; and even less so does
e ordinary law of avulsion.

For a situation such as that disclosed by the record
ere, instead of a solid, unbroken addition to the reced-
g mainland to the south and west, an island is brought
o being in the progress of the erosion of the left bank and
ly a fraction of the resulting accretions attach to the
ht bank, leaving the residue to help form the newly cre-
ed island, it is necessary, as we have said, to discover
me modification of the normal law of accretion. One of
e things which gives us pause is the fact, convincingly
monstrated by the evidence, that, even before accretions
gan to show themselves along the Kansas bank of the
er, one or more sand bars, eventually rising to the level
d dignity of an island, began to form in the bed of the
er. This formation, in its inception, was certainly on the
issouri side of the main channel of the river. It was at
e upper end of such a sand bar that the ice jam of 1917
1918 is represented to have formed, and, contrary to the
ntention of the Complainant, the ice jam, as we think, if
had any material effect at all on the subsequent flow of
e river, tended to divert more of the flow against and
wn along the Missouri side of the stream rather than to
ange a pre-existing flow along the northeasterly or
issouri banks back into the original major channel along
e southerly or Kansas side of the river. As a natural con-
quence of the emergence and existence of a giant sand bar
island in mid-stream, the proof shows that for a number

of years the Missouri River in Forbes Bend flowed in a divided channel or, as otherwise expressed, in two channels. It was, in fact, no doubt due to the rise of this formidable sand bar, which soon attained the dimensions of a fair-sized island, that accretions began to form and take hold on the right bank of the original single channel next to the Kansas bluff. The accretions thus formed, along the southerly channel, or the greater portion of them, are still there, as may be seen by looking at Complainant's Exhibit 30, File 3, Exhibit 56, File 5, and Exhibit 56-B, File 3. To the extent that such accretions to the Kansas bank actually exist, they must necessarily play their full part in determining the present main navigable channel and the true boundary between the two bordering States along the median line of that main channel.

With these three primary and fundamental facts before us, viz., (1) the location and persistence in that location of the original channel, (2) the presence of an island in midstream, and (3) two separate channels or a split channel and a divided flow of the river, attention may be given to certain applicable legal principles which seem to point the way to a correct solution of the problem in hand.

First of all, we find it laid down as a sure rule that, in the very nature of things, as was declared by the Supreme Court of Missouri, in *Sweringen* v. *St. Louis*, 52 S. W. 346, "accretions depend upon actual contiguity."

In *Crandall* v. *Smith*, 134 Mo. 633, 640; 36 S. W. 612; the same Court again held that accretions, in their formation, must preserve uninterrupted contiguity; that there is nothing saltatory about accretions; and that the doctrine of accretion will not admit of jumping a slough forty to sixty yards in width. This case of *Crandall* v. *Smith* was cited with approval by the Supreme Court of Kansas in *Fowler* v. *Wood*, 73 Kansas, 511, 85 Pac. 763. The principle is recognized and followed by the Court of Appeals of Ken-

tucky in the case of *Nugent* v. *Mallory*, 145 Ky. 824; 141 S. W. 850, where it is said:

> "There must be a natural and actual continuity of the accretion to the land of the riparian owner; if there is a separation of the claimant's lands from the alluvium, his right thereto cannot be maintained. In other words, in the language of some of the opinions, the doctrine of accretion will not admit of jumping a slough."

In the case of *Bellefontaine Improvement Company* v. *Niedringhaus*, 181 Ill. 426; 55 N. E. 184; 72 Am. State Rep. 269, which was a controversy over the title to an island known as "Willow Bar Island" in the Mississippi River between Illinois and Missouri, the Supreme Court of Illinois, in disposing of the case, said:

> "The determination of the controversy • • • depends on whether the island and bar are in the State of Illinois or in the State of Missouri—or, in other words, where the thread of the stream of the main channel is with reference to the lands in controversy. As a part of the controversy, it is necessary to determine whether Willow Bar became and was a part of lands attached to the Missouri shore and constituted a part of the Missouri lands at any time, and whether it was separated therefrom by avulsion."

The Court rejected the claim of loss by avulsion and said:

> "The weight of evidence, however, shows that the navigable channel was on the western side of the river prior to the formation of this island, as it has been a greater part of the time since. The evidence with reference to the time when it first was formed is conflicting • • • There is testimony in the record showing that between 1878 and 1883 (the time not being fixed with certainty,) for a period of about two years

consecutively, the channel was on the east side of Willow bar."

But notwithstanding this temporary diversion of the main channel to the east of the island, the Court held that the boundary line between Illinois and Missouri was west of the island and followed the middle thread of the stream between Willow Bar island and the Missouri bank.

The case of *Degman* v. *Elliott*, 8 S. W. 10, a Kentucky case decided in 1888, involved the question of the shifting of the main stream from one channel to another flowing around an intervening island. After pointing out that the trial court had instructed the jury that, although the creek may have run on the south side of the disputed land in 1861, yet if it gradually washed to the north and, by gradual accretion on the other side, the channel has been changed to the present bed, leaving the land in contest south of the creek, the disputed land belonged to the plaintiff as owner of the land on the south side of the creek as it now runs, the Court of Appeals of Kentucky said:

"The rule attempted to be stated in this instruction applies when one side or bank of a water-course has gained by the gradual washing away of the opposite bank, but has no application at all when the stream itself has shifted from one bed or channel to another, leaving the intervening land comparatively undisturbed. In the latter case, whether the change has been made gradually or suddenly by an unusual flood, there is neither a gain of soil to one or the other owner, nor a change of the boundary line between them. The evidence in this case tends to show that the change of the course of the creek was not made gradually, but suddenly. However, be that as it may, the land in dispute was not made by either the gradual or sudden wearing away of the bank on one side of the stream, and deposition of soil upon the other; but the stream has been changed from the original bed on the south side, which

is yet definable, to another distinct bed on the north side of the land in contest, which now exists as it did before the change took place."

This seeming exception to the general rules of law governing accretion and avulsion, is admirably set forth in *Davis* v. *Anderson-Tully Co.*, 252 Fed. 681, where the Circuit Court of Appeals for the Eighth Circuit in an opinion by Circuit Judge Sanborn, at pages 1685, 1686, said:

"The plaintiff asserts that the change of the main channel from Walnut Bend to Bordeau Chute was caused by an avulsion, while the defendants insist, and the court found, that it was not so caused, but was the result of gradual and imperceptible changes. The court, however, also found that the main channel of the river around through the bend at the time of its change from bend to chute, as subsequently changed by accretion and erosion, was and still is the boundary line between the states of Arkansas and Mississippi. The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Arkansas v. Tenn., 246, U. S. 158, 38 Sup. Ct. 304, 62 L. Ed. 638; Cissna v. State of Tennessee, 246 U. S. 289, 38 Sup. Ct. 306, 307, 62 L. Ed. 720. But the first clause of this rule was made to govern and is applicable to cases where by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the

intermediate lands between the old channel and the new one, but by jumping over them and running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation. Missouri v. Kentucky, 11 Wall. 395, 408, 20 L. Ed. 116; Washington v. Oregon, 211 U. S. 127, 135, 29 Sup. Ct. 47, 53, L. Ed. 118.

The evidence in the record in hand upon the question of avulsion vel non is conflicting; but that question is immaterial, because if there was no avulsion this case falls under the exception to the rule of gradual change. The strongest evidence in support of gradual change goes only to prove that for several years prior to the cut-off, which was probably in the spring of 1873, large volumes of water had been flowing through Bordeau Chute year after year, until residents in the vicinity and those familiar with the river expected the change, and until finally the channel through the chute carried deeper water and was more navigable than the channel around the bend, and then the former became the main channel of navigation and the use of the old channel for commercial purposes and the waters in it gradually receded. There were thousands of acres of land between the old channel and the new one. There was no evidence that the river or its channel crept over these lands by the gradual processes of accretion and erosion. The proof was that the waters of the river gradually cut a new channel south of these lands and abandoned the channel northwest of them, and the conclusion is that the boundary between the states remained

in the old channel of navigation around the bend as it was at the time that the course through Bordeau Chute became the main channel of navigation, and that that boundary now is where that old channel, by the processes of accretion and reliction, had become at the time when the waters flowing through it around the bend became stagnant and ceased to be a running stream."

In the later case of *Commissioner of Land Office of State of Oklahoma* v. *United States,* 270 Fed. 110, the Circuit Court of Appeals for the Eighth Circuit, again speaking by Circuit Judge Sanborn, at pages 113, 114, said:

"Counsel, however, contend that, even if the southwest boundary of the lands of the Osage Tribe at the point in question was the thread of the south channel in the year 1872, that boundary has now become the thread of the north channel because the latter channel is now the main channel of the river, and the old south channel, except in very high water, consists of beds of dry sand with occasional water holes which now lie between the island as it was in 1872 and the lands of Thomas and Edminston on the southwest bank of the river and make their lands on that bank, the filled bed of the south channel, and the island one continuous tract of land, all of which north and east of their lands on the old south bank of the south channel they claim as accretions to those lands. They invoke the familiar rule that the land which by gradual and natural accretion attaches itself to the bank of a river or of an island therein becomes the property of the owner of that bank, and contend that by this process the land in the filled south channel and on the island has become theirs. They concede that, if the southwest boundary of the land of the Osage Tribe was the south channel of the river, as we have found that it was, the middle thread of that channel was the original boundary between their lands and the plaintiff's island, but they insist that this boundary line has been transferred to the thread of the north channel of the river by the fact

that by the gradual filling of the south channel and the gradual diversion of the waters of the river to the north channel during the 40 and more years since 1872 that has become the main channel of the river.

The general rule on this subject is: (1) That where the thread of the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; (2) but, where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Counsel rely upon the first clause of this rule. That clause is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. Davis *v.* Anderson-Tully Lumber Co. 252 Fed. 681, 683, 164 C. C. A. 521, 523; Farnham on Waters & Water Rights, p. 2500; Hahn *v.* Dawson et al., 134 Mo. 581, 591, 36 S. W. 233; City of

Victoria *v.* Schott, 9 Tex. Civ. App. 332, 29 S. W. 681, 687; Glassell et al. *v.* Ross Hansen et al., 135 Cal. 547, 67 Pac. 964; Indiana *v.* Kentucky, 136 U. S. 479, 509, 10 Sup. Ct. 1051, 34 L. Ed. 329; Missouri *v.* Kentucky, 11 Wall. 395, 408, 20 L. Ed. 116; Washington *v.* Oregon, 211 U. S. 127, 135, 29 Sup. Ct. 47, 53 L. Ed. 118. The evidence in this case has convinced that it falls under this exception: The main channel of the river never gradually crept over the intervening space occupied by the island, but from 1872 to the present time it was on either one side or the other of this island. The main channel passed from the south side of the island to its north side by the swinging during many years of the waters of the river from side to side of that stream, by the gradual increase during many years of the proportion of its waters flowing through the north channel and the gradual decrease of the proportion of its waters flowing through the south channel until the north channel became the main channel and the south channel was gradually filled. The island never became an accretion to the lands of the owners of the south bank of the river, and the decree below must be, and it is, affirmed."

Counsel for Complainant, in their printed brief, at page 249, make this commitment: "The law as announced by Judge Walter H. Sanborn stands unchallenged and is evidently a correct statement of the law." Cases decided by this Court which in some sort illustrate the principle of the decisions announced by Judge Sanborn, as indicated above, are *Missouri* v. *Kentucky*, 11 Wall. (78 U. S.) 395, 408; 20 Law Ed. 116, the object of which was to ascertain and establish the boundary between the States of Missouri and Kentucky, at a point on the Mississippi River known as Wolf Island, which is about twenty miles below the mouth of the Ohio; and *Indiana* v. *Kentucky*, 136 U. S. 479, 509; 10 Sup. Ct. 1051; 34 Law Ed. 329, which involved a controversy between the State of Indiana and the State of Kentucky growing out of their rival claims to a tract of

land nearly five miles in length and over half a mile in width, embracing about 2,000 acres, lying on what is now the north side of the Ohio River, and long known as the Green River Island.

The foregoing authorities furnish sufficient support, as we think, for the view we have taken of the respective rights of the parties in the Forbes Bend area of the Missouri River, as the history of that part of the river for the past forty or forty-five years has been unfolded through the evidence in the record. Much of this evidence is conflicting and contradictory and, in some particulars, would appear to be irreconcilable. So far as deemed requisite, we have condensed and recapitulated the essence of this evidence and the total impression, rather than the unabridged details, of it all, seems strongly to invite, if it does not positively compel, the conclusion that Complainant has not succeeded in dislodging Respondent from its occupation of and dominion over the land on the north and east side of the river in the Forbes Bend area, nor has it ousted Respondent of its jurisdiction and sovereignty over said lands.

VI.

Stipulations Concerning Boundary.

As heretofore indicated, the parties have come to an agreement and have entered into certain stipulations concerning the entire boundary between them from the north boundary of the State of Kansas at the Nebraska line, or 40th degree of north latitude, southwardly along the line of the Missouri River for a distance of approximately 128 miles to the middle of the mouth of the Kaw or Kansas River, where it intersects with the middle of the main navigable channel of the Missouri River, subject, however, to the single exception of that portion of the boundary which lies in the area known as Forbes Bend. The mate-

rial parts of these stipulations will be incorporated in the recommendations for a decree, but it may facilitate consultation of them to give references here to their places in the record along with a few brief comments.

The first stipulation filed is designated "Stipulation—Part One," (Comp's. Ex. 1-A, File 4.) This stipulation covers the river boundary from the Nebraska line or 40th parallel, north latitude, southward to the upper end of the Forbes Bend area, which is yet in controversy. (Tr. I, 72-77.) This part of the common boundary, according to said stipulation, is agreed to be the mid-channel or course of the Missouri River as it now flows, with the exception of a departure from that course in what is known as the Forest City area, as particularly defined in the field notes and plat filed as Complainant's Exhibits 124, File 1, (Tr. II, 1412,) and 125, File 1, (Tr. II, 1412).

The second stipulation filed is designated "Stipulation—Part Two," (Comp's. Ex. 123-A, File 4.) This stipulation covers the river boundary from the downstream or lower end of the Forbes Bend area, which remains in controversy, southwardly along the course or channel of the river, as located by the description in said stipulation, all the way to the mouth of the Kaw or Kansas River, except for a departure from that course in what is known as the Kotsch Island area, is particularly defined in the field notes and plat filed as Complainant's Exhibits 126, File 1, (Tr. III, 1414, 1415,) and 127, File 1, (Tr. III, 1414, 1415,) and except that so much of said boundary line as passes through the Iatan Bend or Cow Island area, (as indicated at page 6 of said stipulation,) is reserved for more exact delineation in a subsequent stipulation. This part of the description which is incomplete refers to the Iatan Bend segment of the boundary in these words:

> "To the upstream or upper end of the Iatan controversy where the boundary again leaves the Missouri

River upon the left bank thereof and traverses land, and again at the downstream or lower end of the Iatan Controversy returns upon the left bank of the Missouri River to the course or channel of the said Missouri River."

(Tr. II, 1399-1408.)

Complainant's Exhibits 128 and 129, File 1, are filed in further clarification of "Stipulation—Part Two," (Comp's. Ex. 123-A, File 4,) as explained in Tr. III, 1421. Also, in support and further elucidation of "Stipulation—Part Two", (Comp's. Ex. 123-A, File 4,) were filed Comp's. Ex. 130, File 1, (Tr. III, 1424,) and Comp's. Ex. 130-A, File 1, (Tr. III, 1425;) also, Comp's Ex. 131, File 1, and Comp's. Ex. 132, File 1, covering the area known as "Kickapoo Island," (Tr. III, 1426-1429,) near Weston, Missouri.

The "unfinished business" relative to the Iatan Bend area is covered and completed by the third stipulation filed under date of June 1, 1943, and designated, "Stipulation—Part Three", (Comp's. Ex. 140 and Comp's. Ex. 141, Tr. III, 1639, in envelope facing page 1638, Tr. III.) For further mention of this third and last stipulation between the parties, reference may be had to pages 1453 to 1456, both inclusive, of Volume III of the Transcript.

As this last stipulation recites, it covers and includes the boundary line as it traverses land in the area commonly known and designated as the Cow Island or Iatan area, and the description contained in this third stipulation is to be inserted at the point on page 6 of "Stipulation—Part Two," where the boundary line passing through Iatan Bend is dealt with in general terms to be made more explicit, by a later stipulation, to-wit: "Stipulation—Part Three", as explained above.

Taken in their entirety, the three foregoing stipulations, with their several expository and qualifying surveys, provide a mutually agreed description of the entire boundary

to be ascertained, determined, and adjudicated herein, with the exception only of so much of the common boundary in controversy as passes through the Forbes Bend area.

VII.

Findings of Facts.

From all the evidence and stipulations, and for the foregoing reasons, I have reached and hereby make the following findings of fact:

1. That the middle of the main channel of the Missouri River, from the mouth of the Kaw or Kansas River northwardly to the original north boundary line of the State of Missouri, to-wit: a parallel of latitude passing through the rapids of the Des Moines River, as that line was determined by this Court in *Missouri* v. *Iowa*, 7 How. (48 U. S.) 660; 12 Law Ed. 861; and 165 U. S. 118; 41 Law Ed. 655, constituted the western boundary of the State of Missouri between said two points on and after the 28th day of March, 1837;

2. That from and after the 29th day of January, 1861, the western boundary of the State of Missouri, as marked on said date by the middle of the main channel of the Missouri River between the mouth of the Kaw River and the southern boundary line of the State of Nebraska, to-wit: the 40th parallel of north latitude, became for the same distance and between the same points the eastern boundary of the State of Kansas;

3. That the Missouri River is and, at all times material herein, has been a navigable stream along that part of its course forming a common boundary between the States of Missouri and Kansas, and the true boundary should and does coincide with the thread of the stream or middle line of its main navigable channel as same now flows, except

where it is agreed and stipulated by the parties that such true boundary line departs from the present bed and channel of the river;

4. That, by agreement and stipulation by and between the parties, all the common boundary in controversy herein has been reduced to practical certainty and fairly described and defined, with the sole exception of that section of the boundary in Forbes Bend, between Doniphan County, Kansas, and Holt County, Missouri, which extends along the main channel of the river for a distance of about five miles northwestwardly from what is known in the record as War Department Mileage Station 510, to War Department Mileage Station 515;

5. That, for a period of about 40 years, from January 29, 1861, the date of the admission of the State of Kansas into the Union, down to about the year 1901, or somewhat later, the main channel of the Missouri River in Forbes Bend flowed along and next or near to the foot of the high ground or bluffs on the right or Kansas side of the stream:

6. That, beginning at sometime between 1900 and 1907, the water in the river began to veer away from its former main channel next to the Kansas bluffs and to cut into and erode the banks on the left or Missouri side of the river, and as this change in its flow progressed three things developed, viz. (1) some gradual accretion to the fast or solid bank on the right or Kansas side of the stream, (2) the emergence of a large sand bar or island in the bed of the river on the Missouri side of the original main channel, built up in part from the bottom and in part enlarged by accretion, and (3) the formation of a split or double channel of the river through most of Forbes Bend;

7. That any ice jams occurring at or near or between Mileage Stations 510 and 515 in Forbes Bend in 1917 or

1918 or 1927, 1928 or 1929, may have contributed in some degree to accentuate or accelerate such movements in the river, wayward or otherwise, as were then under way in that locality, but none of said ice jam was at any time sufficient to cause an avulsive change in the river nor do they adequately account for the behavior of the river at the place and during the period of time here in question;

8. That by nothing in which happened in Forbes Bend from the year 1898 or thereabouts down to the institution of this suit on May 27, 1940, was the main navigable channel of the Missouri River in said bend ever changed from the position it originally occupied next or near to the Kansas bluffs except to the extent that said channel was forced to the north and east toward the left or Missouri side of the river by accretions adhering to the banks on the right or Kansas side and which accreted land remains in existence at the present time;

9. That the same or virtually the same natural forces which progressively diverted the flow of the river toward the north and east in Forbes Bend until the cut bank on the Missouri side and along the left bank of the farther branch of the divided channel had by gradual erosion reached within a short distance of the Burlington Railroad tracks, operated in like manner to turn the main volume of water back into its accustomed channel to the south and west in the vicinity of the higher grounds of Kansas;

10. That if, in utter disregard of all evidence of an intervening island and of a divided flow of the river, it were found to be true that the river moved to its farthest point in a northeasterly direction by the gradual process of accretion, it would nevertheless be true by the weight of the evidence that it returned to its present channel by the very same process. With due regard, however, for what is shown by the evidence of record, it is the deliberate finding

of the Special Master that the formation of an island on the Missouri side of the main channel and the consequent or coincident creation of a divided flow or double-pronged channel do not substantiate but effectually negative and repel the claim of Kansas, the Complainant, to the acquisition of territory north and east of the present main river in consequence of its alleged accretion to the Kansas shore;

11. That the boundary line between the States of Kansas and Missouri in the Forbes Bend area, between Mileage Stations 510 and 515, as numbered according to the 1890 system of surveys and measurements, or from the upper to the lower end of the disputed Forbes Bend area as indicated in "Stipulation—Part One" and "Stipulation—Part two," (Comp.'s. Ex. 1-A, File 4, and Comp's. Ex. 123-A, File 4), should be and is a line that follows and coincides with the middle line of the present main navigable channel of the Missouri River in said bend between said two points.

VIII.

Conclusions of Law.

As conclusions of law, I further find

1. That the claims set forth in Paragraphs VI and VII of Complainant's Bill of Complaint whereby it asserts title to and the right of sovereignty and jurisdiction over certain lands in the Forbes Bend section of the Missouri River, which are now wholly separated from the mainland of Kansas by the present main channel of said river, are not sustained by sufficient evidence but are contrary to the decided weight of the evidence;

2. That the complainant, the State of Kansas, has no valid claim or title to any land in Forbes Bend beyond and to the north and east of the main channel of the Missouri River

as it now flows; and all such claim and alleged right on the part of Complainant should be disallowed; and insofar as the same are asserted in Complainant's Bill any relief thereon in favor of Complainant ought to be denied and the Bill to that extent dismissed;

3. That the aforesaid lands to the north and east of the Missouri River in the Forbes Bend area, herein claimed by the State of Kansas, rightfully belong to the State of Missouri and are under its sovereignty and subject to its jurisdiction and control; that it is lawfully entitled to their possession, use, and enjoyment, and to exercise complete and unrestricted dominion over them, with such incidental powers as constitutionally attach to or inhere in its self-governing political authority as a State of the Union; and that Respondent's rights of ownership, possession, jurisdiction and sovereignty in, to, and over the territory so in controversy between the parties should be upheld and its title confirmed and quieted against all adverse or hostile claims or pretensions of claim of the Complainant and of all persons claiming or to claim by, through or under it; that Complainant, the State of Kansas, should be perpetually restrained and enjoined from disturbing or molesting Respondent, the State of Missouri, its civil or political subdivisions, public officials, and other inhabitants in the possession and enjoyment of the aforesaid lands and from interfering in any way with the exercise by Respondent of full and untrammeled jurisdiction and control over said territory;

4. That, since the parties, by express commitments and formal written stipulations, have composed their differences and have mutually agreed as to all matters in controversy between them respecting the present true boundary separating their respective territories, save and except only the above-mentioned part of said boundary lying in

what is known as the Forbes Bend area (disposed of by findings of fact and conclusions of law hereinabove stated), it is right and proper that the present true common boundary between Complainant and Respondent be ascertained, determined, adjudicated and finally established, as sought and prayed for by both parties, in accordance with the foregoing findings of fact and the present conclusions of law, which, in substance and in principle, are embodied in the recommendations for a decree, as hereinafter formulated.

5. That the matter involved in this suit is governmental in character, each party having a real and not a mere litigious interest, inasmuch as its object is the settlement of the boundary line between sovereign States of the Union in the interest of the peace and good order of said states, and the general well-being of the nation, and is one in which said States have a common interest in reaching a satisfactory and final conclusion. Hence the costs in this suit should be equally divided between and borne by both the States of Kansas and Missouri in equal amounts.

6. That a decree in pursuance of and in harmony with the foregoing findings of fact and conclusions of law should be granted.

IX.

Recommendations for a Decree.

I recommend the following Decree:

This cause having been submitted upon the pleadings, evidence and exhibits, after arguments by counsel, and upon the Master's Report, and the Court having duly considered same and being sufficiently advised,

It Is Ordered, Adjudged and Decreed that the boundary line between the States of Kansas and Missouri, which extends from the intersection of the Missouri River with the

40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, be and it is hereby established as the middle line of the main navigable channel of said Missouri River as said river flowed at the time of the filing of Complainant's Bill of Complaint herein, throughout the entire course of said river from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, with the exception of such deviations and departures from the course of said Missouri River, as it then flowed, as are covered by and provided for in the written stipulations between the parties and are incorparated in the description of said entire boundary hereinafter set forth.

The boundary line hereinbefore mentioned and hereby established is more particularly described as follows, to-wit:

Beginning with the fortieth parallel of north latitude, the same being the boundary between the State of Kansas and the State of Nebraska, at its intersection with the Missouri River, thence down the course or channel of the said River to a place therein opposite which the left bank thereof is a point 15.50 chains West and 9.75 chains South of the Northwest corner of Section Fourteen, Township One, South, Range Nineteen, East, Doniphan County, Kansas.

Thence departing upon and from the left bank (at a point 15.50 chains south of the Northwest Corner of Section Fourteen, Township One-South, Range Nineteen-East, Doniphan County, Kansas) of the present course or channel of the said Missouri River and running North forty degrees thirty-three minutes east for a distance of 34.33 chains.

Thence North 73 degrees 0 minutes East for a distance of 20.89 chains,

Thence North 72 degrees 30 minutes East for a distance of 21.30 chains,

Thence North 73 degrees 40 minutes East for a distance of 5.22 chains, (the same being a point 14.44 chains South of the Southwest corner of Section 26, Township Sixty North, Range Thirty-Nine West, Holt County, Missouri. Thence North 73 degrees 40 minutes East for a distance of 8.59 chains,

Thence North 74 degrees 45 minutes East for a distance of 10.01 chains,

Thence North 72 degrees 15 minutes East for a distance of 12.09 chains,

Thence North 77 degrees 0 minutes East for a distance of 1.32 chains, (the same being a point 36.24 chains North of the Northwest corner of Section Thirteen, Township One-South, Range Nineteen-East, Doniphan County, Kansas, Thence North 73 degrees 45 minutes East for a distance of 6.99 chains, (the same being a point 3.57 chains South of the quarter section corner on the South side of Section Twenty-Six, Township Sixty North, Range Thirty-Nine West, Holt County, Missouri),

Thence North 73 degrees 45 minutes East for a distance of 33.35 chains, (the same being a point 7.75 chains North of the center of Section Twelve, Township One South, Range Nineteen East, Doniphan County, Kansas),

Thence South 85 degrees 0 minutes East for a distance of 40.20 chains,

Thence South 83 degrees 30 minutes East for a distance of 8.00 chains, (the same being a point 38.66 chains South of the center of Section Twenty-Five, Township Sixty North, Range Thirty-Nine West, Holt County, Missouri),

Thence South 83 degrees 30 minutes East for a distance of 4.95 chains,

Thence South 82 degrees 45 minutes East for a distance of 11.01 chains,

Thence South 80 degrees 30 minutes East for a distance of 9.91 chains,

Thence South 80 degrees 0 minutes East for a distance of 8.95 chains,
Thence South 46 degrees 0 minutes East for a distance of 8.67 chains,
Thence South 42 degrees 30 minutes East for a distance of 10.45 chains,
Thence South 38 degrees 0 minutes East for a distance of 10.98 chains,
Thence South 40 degrees 30 minutes East for a distance of 9.99 chains,
Thence South 38 degrees 0 minutes East for a distance of 9.89 chains,

(The same being the center of the road),

Thence South 18 degrees 0 minutes East for a distance of 12.57 chains,
Thence South 14 degrees 26 minutes East for a distance of 13.72 chains,
Thence South 8 degrees 30 minutes West for a distance of 11.74 chains,

(the same being a point 40.52 chains West of the Southeast corner of Section Thirty-One, Township Sixty North, Range Thirty-Eight West, Holt County, Missouri),

Thence South 8 degrees 30 minutes West for a distance of 5.60 chains,
Thence South 12 degrees 30 minutes West for a distance of 12.22 chains,
Thence South 19 degrees 30 minutes West for a distance of 8.98 chains,
Thence South 25 degrees 0 minutes West for a distance of 15.50 chains,

(the same being a point 52.98 chains West and 1.24 chains South of the east quarter corner of Section Six, Township

Fifty-Nine North, Range Thirty-Eight West, Holt County, Missouri), which point also is 68.80 chains East of and 0.47 chains South of the corner to Sections Thirteen, (13), Eighteen (18), Nineteen (19), Twenty-Four (24) in Township One South, Ranges Nineteen and Twenty East, Doniphan County, Kansas),

Thence South 36 degrees 45 minutes West for a distance of 21.00 chains,
Thence South 28 degrees 30 minutes West for a distance of 18.50 chains,
Thence South 38 degrees 15 minutes West (for a distance of 36.30 chains) to the left bank of the Missouri River, at which latter point the said boundary returns to the left bank of the present course or channel of the said Missouri River and from there down the course or channel of the said Missouri River to the place therein where the said Missouri River intersects the West line of Section Twenty-Eight, Township Fifty-Nine North, Range Thirty-Eight West, Holt County, Missouri.

Thence from the place where the Missouri River intersects the West line of Section Twenty-Eight, Township Fifty-Nine North, Range Thirty-Eight West, Holt County, Missouri, on down the course or channel of the said Missouri River, and with the middle line of the main navigable channel of said Missouri River as the same flowed on the 27th day of May, 1940, through the section of said river known as Forbes Bend, in a general easterly and southeasterly direction downstream to the lower end of Forbes Bend to a point in the present course or channel of said Missouri River opposite which the left bank of said river intersects the North and South center section line of Section One, Township Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri, and then beginning at said point in the present course or channel of the said Missouri

River opposite which point the left bank of the said Missouri River intersects the North and South center section line of Section One, Township Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri, and thence proceeding down the course or channel of the said Missouri River to the place therein opposite which the left bank of said Missouri River is a point 2216 feet West and 2096 feet South of the Northeast corner of the Northwest quarter Section Twenty-Two, Township Two South, Range Twenty-One East in Doniphan County, Kansas.

Thence departing upon and from the left bank (at a point 2216 feet West and 2096 feet South of the Northeast corner of the Northwest quarter of Section Twenty-Two, Township Two South, Range Twenty-One East in Doniphan County, Kansas) of the present course or channel of the said Missouri River and running thence North 19 degrees 13 minutes East, 2200 feet,

Thence North 46 degrees 30 minutes East, 4312 feet,

Thence North 29 degrees 40 minutes East, 5104 feet,

Thence North 35 degrees 45 minutes East, 3432 feet,

Thence North 44 degrees 10 minutes East, 660 feet to a point 1298 feet West of the Northwest corner of Section Twelve, Township Two South, Range Twenty-One East in Doniphan County, Kansas,

Thence in a Northeasterly direction for a distance of 1868 feet to a point on the West line of Section One, Township Two South, Range Twenty-One East in Doniphan County, Kansas, which latter point on said West line of said Section One is 1350 feet North of the Southwest corner of said Section One,

Thence North 60 degrees 00 minutes East, 1188 feet,

Thence North 66 degrees 25 minutes East, 1960 feet to a point 820 feet South of the Southwest corner of Section Twenty-Four, Township Fifty-Nine North, Range Thirty-Seven West in Holt County, Missouri,

Thence North 84 degrees 05 minutes East 2618 feet to a point 534.6 feet South of the South quarter corner of Section Twenty-Four, Township Fifty-Nine North, Range Thirty-Seven West in Holt County, Missouri,
Thence South 78 degrees 00 minutes East, 2409 feet,
Thence South 60 degrees 00 minutes East, 2323 feet,
Thence South 43 degrees 30 minutes East, 2748 feet to the left bank of the Missouri River (the same being a point 561 feet upstream from U. S. River Marker numbered 482) at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River,
Thence down the course or channel of the said Missouri River to the place therein opposite which the right bank thereof intersects the south line of Section Ten, Township Five South, Range Twenty-One East in Doniphan County, Kansas,
Thence departing upon and from the right bank of said Missouri River and running thence West upon the South line of said Section Ten, Township Five South, Range Twenty-One East in Doniphan County, Kansas, to the Southwest corner of said Section Ten,
Thence North on the West line of said Section Ten for a distance of 1322 feet,
Thence North 18 degrees 25 minutes West, 1122 feet,
Thence North 61 degrees 53 minutes West, 793 feet,
Thence South 88 degrees 21 minutes West 3434 feet to the West line of Ogden land,
Thence South 89 degrees 40 minutes West, 1783 feet on the South line of the Koch land,
Thence South 10 degrees 03 minutes West, 309 feet,
Thence South 43 degrees 36 minutes East, 196 feet (along center of road)
Thence South 24 degrees 30 minutes West, 504 feet,

Thence South 27 degrees 00 minutes West, 282 feet (to top of levee)
Thence South 32 degrees 30 minutes West, 360 feet (across ditch)
Thence South 35 degrees 34 minutes West, 245 feet,
Thence South 34 degrees 18 minutes West, 809 feet,
Thence South 30 degrees 25 minutes West, 132 feet,
Thence South 14 degrees 13 minutes West, 1254 feet, to a point (marked by an old fence corner post) on the North line of Atchison County, Kansas, which point is 1571 feet East of the present East bank of Independence Creek,
Thence South 00 degrees 00 minutes West, 500 feet,
Thence South 00 degrees 11 minutes West, 750.65 feet,
Thence South 14 degrees 37 minutes West, 749.35 feet,
Thence South 14 degrees 45 minutes West, 800.00 feet,
Thence South 14 degrees 55 minutes West, 1000.00 feet,
Thence South 15 degrees 14 minutes West, 1200.00 feet,
Thence South 15 degrees 02 minutes West, 1000.00 feet,
Thence South 14 degrees 48 minutes West, 795.00 feet,
Thence North 71 degrees 46 minutes East, 117.00 feet,
Thence North 48 degrees 20 minutes East, 100.00 feet,
Thence North 00 degrees 52 minutes West, 158.75 feet,
Thence North 53 degrees 36 minutes East, 259.90 feet,
Thence North 62 degrees 28 minutes East, 159.60 feet,
Thence North 85 degrees 16 minutes East, 326.10 feet,
Thence South 57 degrees 06 minutes East, 519.35 feet,
Thence South 63 degrees 26 minutes East, 268.0 feet,
Thence North 86 degrees 19 minutes East, 412.0 feet,
Thence South 57 degrees 46 minutes East, 536.0 feet,
Thence North 71 degrees 46 minutes East, 124.0 feet,
Thence North 12 degrees 34 minutes West, 328.1 feet,
Thence North 16 degrees 23 minutes East, 295.8 feet,
Thence North 40 degrees 17 minutes East, 238.8 feet,
Thence North 71 degrees 29 minutes East, 166.7 feet,
Thence South 48 degrees 13 minutes East, 201.2 feet,

Thence North 74 degrees 21 minutes East, 694.6 feet,
Thence North 41 degrees 51 minutes East, 125.0 feet,
Thence North 33 degrees 47 minutes East, 59.2 feet,
Thence North 57 degrees 55 minutes East, 193.9 feet,
Thence South 87 degrees 03 minutes East, 369.9 feet,
Thence North 75 degrees 39 minutes East, 285.5 feet,
Thence North 80 degrees 36 minutes East, 361.1 feet,
Thence South 82 degrees 23 minutes East, 304.0 feet,
Thence South 59 degrees 00 minutes East, 187.7 feet,
Thence South 34 degrees 54 minutes East, 173.1 feet,
Thence South 24 degrees 54 minutes East, 268.1 feet,
Thence South 05 degrees 46 minutes East, 77.8 feet,
Thence South 36 degrees 59 minutes West, 338.7 feet,
Thence South 61 degrees 16 minutes West, 252.4 feet,
Thence South 62 degrees 45 minutes West, 313.3 feet,
Thence South 17 degrees 30 minutes West, 296.5 feet,
Thence South 11 degrees 05 minutes West, 167.2 feet,
Thence South 01 degrees 48 minutes West, 460.6 feet,
Thence South 25 degrees 22 minutes East, 250.1 feet,
Thence South 73 degrees 38 minutes East, 277.4 feet,
Thence North 33 degrees 02 minutes East, 151.0 feet,
Thence South 75 degrees 13 minutes East, 329.5 feet,
Thence South 07 degrees 28 minutes East, 126.1 feet,
Thence South 25 degrees 02 minutes West, 244.5 feet,
Thence South 41 degrees 54 minutes West, 215.7 feet,
Thence South 80 degrees 24 minutes West, 251.4 feet,
Thence South 69 degrees 29 minutes West, 210.1 feet,
Thence South 62 degrees 14 minutes West, 495.0 feet,
Thence South 54 degrees 34 minutes West, 386.2 feet,
Thence South 12 degrees 54 minutes West, 443.1 feet,
Thence South 60 degrees 06 minutes East, 263.4 feet,
Thence South 02 degrees 56 minutes West, 283.3 feet,
Thence South 80 degrees 36 minutes West, 136.4 feet,
Thence South 64 degrees 04 minutes West, 192.8 feet,
Thence South 62 degrees 04 minutes West, 236.8 feet,

Thence South 57 degrees 44 minutes West, 342.2 feet,
Thence South 62 degrees 54 minutes West, 293.0 feet,
Thence South 73 degrees 24 minutes West, 230.3 feet,
Thence South 60 degrees 22 minutes West, 267.4 feet,
Thence South 49 degrees 36 minutes West, 344.1 feet,
Thence South 49 degrees 36 minutes West, 200.0 feet,
Thence South 49 degrees 36 minutes West, 71.4 feet

(Northeast corner of St. Benedict's),

Thence South 00 degrees 12 minutes West, 180.3 feet,
Thence South 44 degrees 46 minutes West, 162.4 feet,
Thence South 42 degrees 33 minutes West, 528.0 feet,
Thence South 35 degrees 10 minutes West, 621.7 feet,
Thence South 12 degrees 59 minutes West, 254.8 feet,
Thence South 13 degrees 20 minutes West, 240.2 feet,
Thence South 21 degrees 23 minutes West, 382.8 feet,
Thence South 18 degrees 05 minutes West, 343.9 feet,
Thence South 20 degrees 47 minutes West, 198.0 feet,
Thence South 13 degrees 18 minutes West, 264.0 feet,
Thence South 05 degrees 40 minutes West, 264.0 feet,
Thence South 13 degrees 00 minutes West, 326.0 feet,
Thence South 19 degrees 30 minutes West, 330 feet,
Thence South 26 degrees 44 minutes West, 208.6 feet,
Thence South 00 degrees 00 minutes West, 126.1 feet,
Thence South 00 degrees 00 minutes West, 495.0 feet,
Thence South 00 degrees 00 minutes West, 495.0 feet, to a point upon the right bank of the said Missouri River, at which latter point the said boundary returns upon the right bank of the said Missouri River to the present course or channel of the said Missouri River and running thence down the course or channel of the said Missouri River to the place therein opposite which the left bank of the said Missouri River is 2898 feet East and 2124 feet South of the center of section 26, Township 54 North, Range 37 West in Platte County, Missouri, thence departing upon

and from the left bank of the present course or channel of the said Missouri River, and running thence North to a point 1850 feet South and 258 feet East of the Southwest corner of Section 24, Township 54, Range 37, West of the 5th P. M. in Platte County, Missouri;
Thence East 481 feet;
Thence North 15 degrees 55 minutes East 1924 feet to the South line of the aforesaid Section 24;
Thence East to the North and South center line of Section 6, Township 7, South, Range 22 East in Atchison County, Kansas;
Thence North to a point 880 feet North of the center corner of said Kansas Section 6;
Thence East one mile to a point 880 feet North of the center line of Kansas Section 5, Township 7 South, Range 22 East, in Atchison County, Kansas;
Thence South 880 feet to the center of the aforesaid Kansas Section 5;
Thence East 645 feet to the top of a levee;
Thence South 17 degrees and 30 minutes East, along the top of said levee, 2772 feet;
Thence South 14 degrees East, 2740 feet;
Thence South 11 degrees and 30 minutes East 2721 feet to a point 130 feet East of the Southeast corner of Section 8, Township 7, Range 22 East of the 6th P. M. in Atchison County, Kansas;
Thence South 5 degrees and 10 minutes East, along the center of a slough, 2969 feet to the left bank of the Missouri River, the latter point being 1750 feet West of the Southeast corner, of the Southwest quarter of Fractional Section 32, Township 54, Range 36 West of 5th P. M., in Platte County, Missouri, at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River,

Thence down the course or channel of the said Missouri River to the place therein opposite which the left bank of the said Missouri River is 1878 feet West and 1172 feet North of the West quarter corner of Section Thirty-Five, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,

Thence departing upon and from the left bank of the present course or channel of the said Missouri River and running

Thence South 65 degrees 57 minutes East, 502 feet,

Thence North 86 degrees 03 minutes East, 207 feet,

Thence North 74 degrees 03 minutes East, 200 feet,

Thence South 71 degrees 57 minutes East, 300 feet,

Thence South 86 degrees 57 minutes East, 800 feet,

Thence North 77 degrees 03 minutes East, 2 feet to a point on the West line of Section Thirty-Five, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,

Thence North 77 degrees 03 minutes East, 628 feet,

Thence North 36 degrees 03 minutes East, 900 feet,

Thence North 51 degrees 03 minutes East, 900 feet,

Thence North 63 degrees 03 minutes East, 7 feet to a point on the north line of Section Thirty-Five, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,

Thence North 63 degrees 03 minutes East, 294 feet,

Thence North 76 degrees 18 minutes East, 292 feet,

Thence North 78 degrees 18 minutes East, 111 feet to a point on the north and south center section line of Section Twenty-Six, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,

Thence North 78 degrees 18 minutes East, 648 feet,

Thence North 84 degrees 30 minutes East, 688 feet,

Thence North 86 degrees 56 minutes East, 915 feet,

Thence North 65 degrees 28 minutes East, 450 feet to a

point on the East line of Section Twenty-Six, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,
Thence North 65 degrees 28 minutes East, 212 feet,
Thence North 81 degrees 57 minutes East, 1054 feet,
Thence North 86 degrees 29 minutes East, 301 feet,
Thence South 87 degrees 11 minutes East, 350 feet,
Thence South 85 degrees 31 minutes East, 382 feet,
Thence South 84 degrees 30 minutes East, 1478 feet,
Thence South 80 degrees 00 minutes East, 628 feet,
Thence South 72 degrees 31 minutes East, 196 feet to Bear Creek,
Thence following the meander of said Bear Creek and running thence South 39 degrees 03 minutes East, 601 feet to a point on the North line of Section Thirty-Six, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,
Thence South 39 degrees 03 minutes East, 609 feet to a point on the East line of Section Thirty-Six, Township Seven South, Range Twenty-Two East in Leavenworth County, Kansas,
Thence South 39 degrees 03 minutes East, 231 feet,
Thence South 41 degrees 39 minutes East, 1995 feet,
Thence South 8 degrees 01 minute East, 505 feet to a point on the East and West center section line of Section Thirty-One, Township Seven South, Range Twenty-Three East in Leavenworth County, Kansas,
Thence South 08 degrees 01 minute East, 175 feet,
Thence South 43 degrees 56 minutes East, 290 feet,
Thence South 78 degrees 52 minutes East, 400 feet,
Thence South 03 degrees 00 minutes East, 329 feet,
Thence South 38 degrees 58 minutes East, 480 feet,
Thence South 68 degrees 02 minutes East, 930 feet to a point upon the left bank of the Missouri River where the said Bear Creek empties into the said Missouri River and

which latter point is 1039 feet North and 408 feet East of the South quarter corner of Section Thirty-One, Township Seven South, Range Twenty-Three East in Leavenworth County, Kansas, at which latter point the said boundary returns upon the left bank of the said Missouri River to the present course or channel of the said Missouri River and running thence down the course or channel of the said Missouri River to the mouth of the Kansas River.

The said boundary line throughout its entire length shall be permanently located and marked by monuments with proper inscriptions, or as the parties Complainant and Respondent may agree; and in default of such agreement, a commissioner or commissioners shall be appointed to locate and mark the boundary line by such method as may be prescribed by order of this Court.

The State of Kansas, its officers, agents and representatives, its inhabitants, and all other persons, are perpetually enjoined from disputing or opposing the sovereignty, jurisdiction and dominion of the State of Missouri over the territory adjudged to said state by or in consequence of this decree; and the State of Missouri, its officers, agents and representatives, its inhabitants, and all other persons, are perpetually enjoined from disputing or opposing the sovereignty, jurisdiction and dominion of the State of Kansas over the territory adjudged to said state by or in consequence of this decree.

That insofar as the claims asserted by Complainant, the State of Kansas, in its Bill and, particularly in paragraphs VI and VII thereof, with respect to the Forbes Bend area of the Missouri River, and the relief sought by said Complainant in and by said Bill, are at variance with the terms of the foregoing decree, such claims and relief are denied and said Bill to this extent is dismissed.

The costs of this suit are equally divided between the two states, Complainant and Respondent; and this case is

retained on the docket for further orders in fulfillment and enforcement of the provisions of this decree.

Respectfully submitted,

SAMUEL M. WILSON,
Special Master.

APPENDICES.

A.

A Joint Resolution adopted by the Congress of the United States and approved by the President on June 7, 1910, to which reference is made by the Special Master, (Tr. II, 1392-1394,) and which is copied into the printed Brief on behalf of the Complainant, at pages 8 and 9 thereof, is here reproduced:

"H. J. R. 160.

(No. 31.) Joint Resolution To enable the States of Missouri and Kansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Missouri River and adjacent territories.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the States of Missouri and Kansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States or of any law thereof, to agree upon and fix the boundary line between said States, and to cede, respectively, each to the other, such tracts or parcels of the territory of each State as may now or hereafter be separated from the main body thereof by the waters of the Missouri River, and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Missouri River, and in such portions of each of said States as may be separated from the main body thereof by the waters of the Missouri River as aforesaid.

Approved, June 7, 1910.

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36 U. S. Stats. at Large, p. 881, and House of Reps. Joint Resolutions, 61st Cong., 1909-1911, p. 295.

B.

To the diligence of counsel we owe the discovery of the following record, here made available, of the Congressional debate on House Joint Resolution 160 when it was under consideration by the House on April 19, 1910. The debate which then took place is reported in the Congressional Record, Vol. 45, Part 5, 61st Congress, 2d Session, at pages 4910, 4911, as follows:

> "The first business on the Calendar for Unanimous Consent was the joint resolution (H. J. Res. 160) to enable the States of Missouri and Kansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Missouri River and adjacent territory.
>
> "The joint resolution was read, as follows:
>
> > House joint resolution 160. "*Resolved, etc.*, That the consent of the Congress of the United States is hereby given to the States of Missouri and Kansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States or of any law thereof, to agree upon and fix the boundary line between said States, and to cede, respectively, each to the other, such tracts or parcels of the territory of each State as may now or hereafter be separated from the main body thereof by the waters of the Missouri River, and also to adjudge, and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Missouri River, and in such portions of each of said States as may be separated from the main body thereof by the waters of the Missouri River as aforesaid.
>
> "The SPEAKER. Is there objection?
>
> "Mr. HUGHES of New Jersey. Reserving the right to object, I want to ask the gentleman from Missouri a question or two as to the object of this bill. I re-

member one time in our legislature a bill somewhat similar to this was introduced in order to get rid of a very popular constable. The lines of a township were changed overnight, so that he was put without the confines of the township, in order that he might not be able to run at the next election; but the gentleman got together his neighbors and put his house upon skids, and got three or four teams of horses and moved his house over the township line, and was again a candidate for election; and it is only proper to add that he was almost unanimously reelected. I do not know whether this is that kind of a bill or not, but it seems to me somewhat similar in its general provisions, and I do not want to be a party to any such a conspiracy as that.

"Mr. OLMSTED. I will say to the gentleman that Missouri is very wet and Kansas is very dry, and this is merely to define the place where a man can get a drink of whisky. (Laughter.)

"Mr. MOON of Pennsylvania. I yield to the gentleman from Missouri (Mr. Booher.)

"Mr. BOOHER. Mr. Speaker, both the gentleman from Pennsylvania (Mr. Butler) and the gentleman from New Jersey (Mr. Hughes) are wrong in their ideas about the object of this bill, as I can prove by my friend, the gentleman from Kansas (Mr. Reeder). Kansas is not dry at all seasons of the year, nor is Missouri wet all the time except in spots. (Laughter).

"The object of this bill is simply to give to these States the right to fix the line between them. The Missouri River has cut off points of land, so that land which was formerly upon one side of the river is now upon the other. The object of the bill is simply to allow the legislatures of the States to provide a way by which the state line may be made to be the center of the Missouri River in all these places.

"Mr. OLMSTED. Would they not have to pass a new law every time they had a new flood?

"Mr. BOOHER. It is proposed to make it apply to pieces of land that may be cut off hereafter.

"Mr. FOSTER of Illinois. Is it proposed to fix the center of the river for all time?

"Mr. BOOHER. Oh, no. That would be too great an undertaking, even for this Congress. This does not fix any line at all, but merely gives the States the right to fix it whenever they want to.

"Mr. Speaker, the necessity for the passage of this joint resolution is evident by reading the report of the committee.

"For a number of years the people living along the Missouri River have been annoyed by having small parcels of land scattered along its borders that might very properly be characterized as 'no man's land.'

"They have been the source of endless litigation, and afford a place of refuge for those who are disposed to violate the law.

"The States of Kansas and Missouri, separated by the Missouri River, are given concurrent jurisdiction over offenses committed on it.

"The western boundary of Missouri is the Missouri River, and it has been held to mean the middle of the main channel of the river as it existed at the time the boundary line was established.

"It was said by the Supreme Court of the United States, in Handly, lessee, *v.* Anthony (5 Wheat.) that—

> " 'Where a great river is the boundary between two nations or states, if the original property is in neither and there is no convention respecting it, each holds to the middle of the stream.'

"Running as it does through loose alluvial soil, the banks are continually caving into the river and washing away.

"The course of the Missouri has undergone innumerable changes, and what is the middle of the river to-day may be a long way from the middle of the river tomorrow. Although the middle of the river may change many miles, the boundary line between the States still remains as located when it was made the

line between the States. In other words, the river may rove around the country at will, but the boundary line will remain as originally located.

"The boundary line is fixed and permanent, and the shifting channel does not affect it. As said by the Supreme Court of the United States in the case of Indiana *v.* Kentucky:

> " 'Her jurisdiction and dominion continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main channel of the river was held to be the proper boundary between the two States. That, however, is a matter of arrangement and settlement between the States themselves, with the consent of Congress.'

"The Supreme Court of the United States in Handly, lessee, *v.* Anthony (5 Wheat.) said:

> " 'Where a great river is a boundary between two nations or States, if the original property is in neither and there is no convention respecting it, each holds to the middle of the stream.'

"That is, to the center of the navigable channel, as distinguished from the center of the river from bank to bank.

"In the case of the State of Missouri *v.* Keane, (84 Mo. App., 127), the Kansas City Court of Appeals, speaking through Judge Ellison, said:

> " 'The question involved here is one of great importance. Fortunately it has in recent years received the attention of several of the highest tribunals in the country. As a result of that consideration there is no longer any doubt that where a navigable river is the boundary between two States the exact line of that boundary is the center of the navigable channel, as distinguished

from the center of the river from bank to bank. One great consideration for this conclusion, as an original proposition, was that it could hardly be supposed that either nation would surrender wholly to the other that portion of the stream which was its chief value to the State; that is, that portion which was capable of bearing upon its surface the commerce in which all civilized States are interested. While that consideration is not so forceful between States like ours, under one general government, yet it is only less in degree, and the original consideration existing as between independent nations is applicable with us.

"If there is a gradual or imperceptible change in the course of such a stream, the 'river as it runs'—that is, the channel of the river as it runs—will remain the boundary. But if there is a sudden avulsion, the river seeking a new course and leaving the old bed as dry land, as in this case, the new course of the stream will no longer mark the boundary; the boundary will remain as it was before the sudden change; that is, in the middle of the navigable channel as it existed just before the sudden shifting of the course. (Iowa *v.* Illinois, 147, U. S., 1; Nebraska *v.* Iowa, 143 U. S., 359; St. Louis *v.* Rutz, 138 U. S., 235; Rees *v.* McDaniel, 115 Mo., 145; Buttenuth *v.* Bridge Co., 123 Ill., 535; Railway *v.* Clinton, 88 Iowa, 188.)"

"This seems to be the well-established law; in fact, there is no dissent from it to be found in the books.

"The passage of this bill will prevent vexatious and almost endless litigation. In a great many instances it is almost impossible to prove jurisdiction.

"A class of petty criminals escape punishment on account of the difficulty experienced in proving venue. The lawless seek these cut-offs, as they are generally called, to ply their unlawful vocations.

"The unlawful sale of liquor and gambling are the principal crimes committed in these localities, and the

authorities seem powerless to prevent it or to punish the guilty for the reason that it is not possible to prove the venue, because no man knows where the middle of the navigable channel of the river was when Missouri was admitted in 1821, and that fact must be proven.

"The passage of this resolution will confer upon these States the right to fix the boundary line, and by so doing confer jurisdiction upon the courts, and in no other way can it be done.

"I hope the resolution will pass.

"Mr. FOSTER of Illinois. At any time or at once?

"Mr. BOOHER. At any time that it is necessary to fix it in a new place.

"Mr. FOSTER of Illinois. It may be necessary after every flood that comes in the Missouri River to get together and fix the boundary line between Missouri and Kansas, as I understand.

"Mr. BOOHER. That would not interfere with the gentleman from Illinois. It would apply only to the people of Missouri and Kansas.

"Mr. HUGHES of New Jersey. Will this help the Democrats to carry Missouri?

"Mr. BOOHER. I am not sure that it will add anything to the vote or take anything away from it, and do not think it material or should enter into the question of the passage of the bill. The reasons for the passage of the resolution are very fully set forth in the committee report.

"The SPEAKER. Is there objection?

"There was no objection.

"The joint resolution was ordered to be engrossed and read a third time, and was accordingly read the third time and passed."

The House Judiciary Committee report on this joint resolution is reported in the 61st Congress, 2d Session, 1909-1910, Volume 2, Miscellaneous 11, Report number 886. The substance of this committee report is repeated in the argument of Representative Booher, the sponsor of the Joint Resolution, as set out above.

C.

For that part of Sheet No. 1 of the Project Maps of the Missouri River in the Kansas City District, extending from Rulo, Nebraska, to the mouth of said River, of the series of said Project Maps issued under date of September 30, 1941, by the United States Engineer Office at Kansas City, Missouri, which has been prefixed as a sort of frontispiece to this Report and as a graphic representation of the entire boundary involved herein, we are indebted to the courtesy of said Kansas City office of the Corps of Engineers of the U. S. Army.

In connection with said collection of 1941 Project Maps, reference may be had to an illustrated pamphlet of thirty-one pages entitled "Improvement of the Missouri River by the Corps of Engineers, U. S. Army", in the Second Revision thereof, dated November 1, 1939. This pamphlet contains an excellent account of the methods and means employed by the United States Engineers in their work of rectifying, controlling, and stabilizing the channel and flow of the Missouri River.

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE STATE OF KANSAS, *Complainant,*

vs.

THE STATE OF MISSOURI, *Respondent.*

COMPLAINANT'S EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

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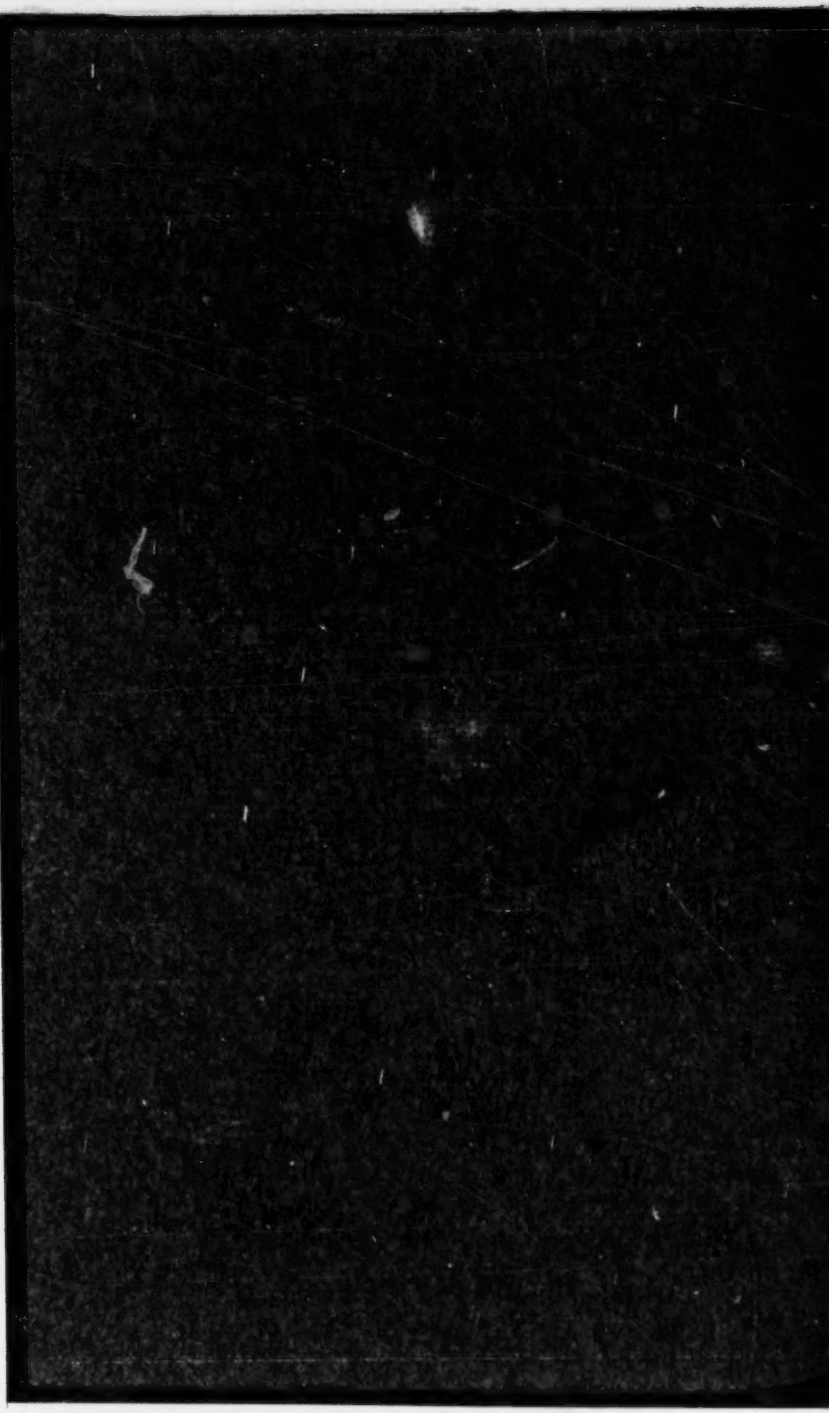

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No. 9, Original

COMPLAINANT'S EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

The State of Kansas, complainant herein, pursuant to the order of this Court, herewith submits its exceptions to the report of the Special Master, Samuel M. Wilson, filed in this case on October 11, 1943, and sets forth said exceptions in the following particulars, to wit:

1

Complainant excepts to the Finding of Fact No. 3 and moves to amend the same by adding thereto the following clause:

> "and also except as to the boundary involved in the Forbes Bend controversy lying between

what is known in the War Department as Mileage Station 510 to Mileage Station 515";

for the reason that it is shown by the evidence that the true boundary should follow the thalweg of the river in the Missouri or left channel as it flowed in 1927 or 1928 as shown by Complainant's Exhibit 46, which is the nearest documentary proof, and which is more particularly referred to in subsequent Complainant's suggested findings.

2

The Complainant excepts to all that portion of Finding of Fact No. 6 contained in sub-sections (2) and (3) thereof, and moves that they be stricken out *in toto* and there be substituted in lieu thereof the following:

"(2) The river gradually changed its course by erosion to the North and East until the main channel of the river reached almost to the Chicago, Burlington & Quincy Railroad right-of-way. The farthest left erosion bank is shown on the Peret map, (Complainant's Ex. 55). The corresponding accretion on the right or Kansas side of the bank immediately accumulated, filling in as a bar on the right or Kansas side of the stream. Except in high water this bar was continuous from the right high bank of the river to the water flowing in the river channel. In high water low portions of the bar were sometimes covered with water.

(3) About 1917 or 1918 an ice jam formed in the vicinity of War Department Station 515, thus forming a dam, and water was forced to flow across the bar at or near the Kansas side. Thereby, what was originally a bar solidly and continuously attached to the right high bank or Kansas side of the river was separated from the Kansas high bank by a newly formed second channel. The old channel also continued to flow, thus forming an island out of the sandbar.

(4) Afterwards, and about 1927 or 1928, there was formed another large ice jam in the left channel at the upper end of the aforementioned island. This caused the right channel near the right or Kansas bank to enlarge immediately and become the main channel of the river. The Missouri or left channel thereafter gradually filled up and finally became dry, except during high water."

These changes are suggested for the reason that it is clearly shown by the evidence that what has been described by the Special Master as an island or sandbar was originally an accretion attached to the Kansas bank and accreted by reason of the fact that the channel of the river was diverted far to the left or Missouri side of the river by undermining and eroding the lands on the Missouri side to such an extent that many hundreds of acres of Missouri land were eroded and the soil therefrom was dissolved and carried down the stream; while at the same time, because of the still waters along the right bank of

the river, other soil was deposited as accretions to the Kansas bank. The island did not come into existence until the first avulsion in 1917 or 1918, after which time there was a divided flow until about 1931 when the Missouri channel finally became dry.

3

Complainant excepts to Finding No. 7 and moves to strike out Finding No. 7 *in toto* and insert in lieu thereof the following:

> "7. That an ice jam occurred in 1917 or 1918 at or near War Department Mileage Station 515 in Forbes Bend. This first avulsion caused a channel to form across the accreted land, which channel flowed near the Kansas bluff, thus forming an island. The left or Missouri channel continued to be the main channel until about 1927 or 1928, at which time a second ice jam occurred in the Missouri channel at or near the head of said island. This second ice jam immediately caused an enlarged flow in the Kansas channel and it then became the main channel. The Missouri channel gradually filled in during the next three or four years and ceased to flow thereafter."

The evidence shows the two avulsions of 1917 or 1918 and 1927 or 1928. There is no contradictory evidence. The overwhelming evidence is that an island was not formed until the first avulsion which created it. There-

after the river flowed in two channels until the second ice jam of 1927 or 1928 which caused an immediate diversion of the principal flow into the Kansas channel. The Missouri channel then gradually filled in during the next three or four years and thereafter contained water only in overflow periods.

4

Complainant excepts to Finding of Fact No. 8 and moves that all of Finding No. 8 be stricken out and there be inserted in lieu thereof the following:

> "8. From the year 1898 up to and about 1923 the channel of said river in Forbes Bend gradually shifted from Kansas to Missouri in a northerly and easterly direction by the erosion of the Missouri or left bank and the formation of accretions on the Kansas or right bank of the river, until the left bank thereof was near the right of way of the Chicago, Burlington & Quincy Railroad, all of which is shown on the Peret map (Complainant's Ex. 55), and the center of said channel became, by reason of such gradual shifting, the true boundary line between Missouri and Kansas. The Kansas riparian owners to whose lands the accretions formed took possession of the accretions and occupied them. By the first avulsion of 1917 or 1918 a large portion of the accreted lands became a large island, and the island continued to be occupied by and farmed by the Kansas riparian owners who placed improvements thereon. This oc-

cupancy continued until after the second avulsion and until about 1931 when Missouri issued deeds covering some of the accretions. The holders of Missouri deeds then forcibly took possession of the island."

The evidence clearly shows that between 1898 and about 1923 there was a constant erosion of the left bank of the river and a corresponding accretion to the right bank of the river. This is shown not only by the oral testimony which will be referred to in the brief, but appears on the Exhibits. The evidence is uncontradicted that the Kansas riparian owners took possession of and occupied the accreted lands from the beginning and continued to do so after the accretions were cut off from the main land by the avulsion of 1917 or 1918 and became an island. It was not until about 1931 when these accretions became high ground that Missouri issued deeds covering the island and the deed holders forcibly took possession of the accreted lands contained within the island.

5

Complainant excepts to Finding No. 9 and moves that all of Finding No. 9 be stricken and there be inserted in lieu thereof the following:

"9. About 1917 or 1918 and after the river had shifted its channel in Forbes Bend as stated above

in complainant's suggested Finding No. 8, an ice jam occurred at about War Department Mileage Station 515 in Forbes Bend, causing the water to cut across the accreted land on the right or Kansas bank, and from that time on there was a flow of water on each side of said accreted land, thus forming an island with the main or principal channel on the left or Missouri side of the island. Afterwards, and about 1927 or 1928, a second ice jam formed at about the same point and near said Mileage Station 515 and the channel on the Kansas or right side of the island was thereby immediately enlarged and it thereafter became the main or principal channel. The Missouri channel then gradually filled in and ceased to flow thereafter at normal river stage."

6

The complainant excepts to Finding No. 10 and moves that all of Finding No. 10 be stricken. The evidence fails to support Finding No. 10 as made by the Special Master.

7

Complainant excepts to that portion of Finding No. 11, beginning in line eight thereof, and reading as follows:

> "and coincides with the middle line of the present main navigable channel of the Missouri River in said bend between said two points."

and moves that said lines be stricken out and the following inserted in lieu thereof:

"the thalweg of the river in the left or Missouri channel thereof, as it flowed at the time of the second avulsion in 1927 or 1928, and as indicated on Complainant's Exhibit 46."

The evidence fails to support the finding of the Special Master.

8

Complainant excepts to Conclusion of Law No. 1, and moves that the same be stricken and that the following be inserted in lieu thereof:

"1. That the claims set forth in Paragraphs VI and VII of Complainant's Bill of Complaint whereby it asserts title to and the right of sovereignty and jurisdiction over certain lands in the Forbes Bend section of the Missouri River, which are now wholly separated from the mainland of Kansas by the present main channel of said river, are sustained by sufficient evidence."

9

Complainant excepts to Conclusion of Law No. 2, and moves that the same be stricken and that the following be inserted in lieu thereof:

"2. That the complainant, the State of Kansas, has a valid claim or title to land in Forbes Bend beyond and to the north and east of the main channel of the Missouri River as it now flows."

10

Complainant excepts to Conclusion of Law No. 3, and moves that the same be stricken and that the following be inserted in lieu thereof:

> "3. That the aforesaid lands to the north and east of the Missouri River in the Forbes Bend area, herein claimed by the State of Kansas, rightfully belong to the State of Kansas and are under its sovereignty and subject to its jurisdiction and control; that it is lawfully entitled to their possession, use, and enjoyment, and to exercise complete and unrestricted dominion over them, with such incidental powers as constitutionally attach to or inhere in its self-governing political authority as a State of the Union."

11

Complainant excepts to that portion of the recommended decree beginning with the last paragraph on page 100 of the printed report of the Special Master, and which reads as follows:

> "Thence from the place where the Missouri River intersects the West line of Section Twenty-Eight, Township Fifty-Nine North, Range Thirty-Eight West, Holt County, Missouri, on down the course or channel of the said Missouri River, and with the middle line of the main navigable channel

of said Missouri River as the same flowed on the 27th day of May, 1940, through the section of said river known as Forbes Bend, in a general easterly and southeasterly direction downstream to the lower end of Forbes Bend to a point in the present course or channel of said Missouri River opposite which the left bank of said river intersects the North and South center section line of Section One, Township Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri";

and moves that the same be stricken and that the following be inserted in lieu thereof:

"Thence from the place where the Missouri River intersects the West line of Section Twenty-Eight, Township Fifty-Nine North, Range Thirty-Eight West, Holt County, Missouri, on down the course or channel of the said Missouri River following the thalweg of the said Missouri River in the left or Missouri channel thereof as it flowed at the time of the second avulsion in 1927 or 1928, and as indicated on Complainant's Exhibit 46, the same to be definitely fixed and determined by a survey to be made under the direction of the Master by competent engineers, unless the Complainant and Respondent can agree upon the location of said line, to a point in the present course or channel of said Missouri River, opposite which the left bank of said river intersects a North and South center section line of Section One, Town-

ship Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri."

Respectfully submitted,

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29-1245

FILE COPY

No. 9, Original

In the Supreme Court
of the United States

October Term, 1943

THE STATE OF KANSAS, *Complainant,*

vs.

THE STATE OF MISSOURI, *Respondent.*

COMPLAINANT'S BRIEF IN RE EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER.

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20-1675

INDEX

PAGE

COMPLAINANT'S BRIEF IN RE EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER 5
Preliminary Statement 5
Brief of Oral Testimony 10
Witnesses:
Pardee Dyer 11
Clara Dyer 14
Ed Martin 14
Nettie Martin 14
George Pridgeon 16
Esta Surles 17
W. M. Davies 18
Kenneth Brownlee 19
Judge Ryan 20
John H. Peret 24
Howell E. Geiger 25
John Kotsch 26
John Coufal 27
Mrs. John Coufal 28
Mrs. Sam Jenkins 28
John H. Simpson 29
Raymond Elmer Simpson 30
John Bottinger 33
Paul Bottinger 34
Charles Baskins 35
George Atkinson 37
William R. Hatch 39
Louis F. Stalcup 39
George Larson 40
Clifford Coufal 41
A. F. Hays 41
John B. Gray 42
Dave Barbour 42
R. L. Greene 43
Carl Harrison 43

PAGE

Clarence Harper 43
Clay Hudgins 44
Bryan Hudgins 44
Ed McCoy 45
Avon H. Murray 45
John Guyer 46
Ralph Dyer 47
James Fitzgerald 47
William Metcalfe 48
Ed Cotton 49
Verde Harrison 49
Raymond Dyer 50
Mrs. Murel Dyer 50
Clarence Dinwiddie 51
Clate Schaeffer 51
Mrs. Edna Schaeffer 52
Kenneth Robinson 53
Joseph H. Gray 53
Ice Jams of 1917 and 1920 60
Maps and Documentary Evidence 75
Witnesses:
Howell E. Geiger 92
John H. Peret 90
The Law 102
Conclusion 112

FINDINGS OF THE SPECIAL MASTER:

Finding 6 113
" 7 113
" 8 113
" 9 113
" 10 113
" 11 113

CONCLUSIONS OF LAW OF THE SPECIAL MASTER:

Conclusion 1 115
" 2 115
" 3 115

PAGE

COMPLAINANT'S EXHIBITS:

Exhibit 30 88
" 46 77
" 47 81
" 48 68
" 49 84
" 50 76
" 51 76
" 52 76
" 53 76
" 55 88
" 58 91
" 102 83
" 134 84
" 138 88

RESPONDENT'S EXHIBITS:

Exhibit 25 76
" 26 76

INDEX OF CASES AND AUTHORITIES

CASES: PAGE

Arkansas v. Tennessee, 38 S. Ct. 305..... 112
Brown v. Wilson, 36102, S. Ct. Mo., Syl. 7, 155 S. W. 2d 176.. 111
Commissioners v. United States, 270 Fed. 110..... 113
Davis v. Anderson Tully Co., 252 Fed. 681..... 105
Davis v. Columbia River, 50 F. 2d 961, 963..... 109
McCormick v. Miller, 349 Mo. 463, Syl. 2, 144 S. W. 101.... 110
Nebraska v. Iowa, 36 L. Ed. 189, 143 U. S. 370..... 112
Nebraska v. Iowa, 36 L. Ed. 189, 143 U. S. 370..... 110
Nebraska v. Iowa, 36 L. Ed. 189, 143 U. S. 370..... 103
Veatch v. White, 23 F. 2d. 69..... 109

AUTHORITIES:

45 C. J. 532..... 103

In the Supreme Court
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No. 9, Original

COMPLAINANT'S BRIEF IN RE EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER.

Preliminary Statement

We respectfully suggest that the Master did not approach the hearing and the decision of this matter with an open mind, but rather with the mind of an advocate seeking, if possible, to justify a decision to give back to the State of Missouri something of which, as it appeared to him, it had been unfairly deprived by the course of nature. He recognized and specifically stated the law to be that the boundary between states shifts

with the river channel if it move by erosion and accretion, and that the boundary does not shift back if a new channel is thereafter made by cutting across an oxbow or bend in the river caused by such erosion and accretion. Nevertheless he sought for some way to avoid the effect of such well proved action of the Missouri River at Forbes Bend by disregarding definite and impartial testimony establishing erosion and accretion, as well as avulsion, and listened with attentive ears to indefinite testimony, much of which was given by self-interested witnesses to the effect that an island emerged in the middle of the stream on the Missouri side of the channel. In that way he found a way to give back to Missouri several thousand acres of land which everybody testified fell into the river between the years 1900 and 1928. He says the complainant

> "is seeking to recover land which it claims to have captured from Missouri by a gradual change in the channel of the river and the imperceptible process of accretion but which, in consequence of two successive avulsions, was snatched or torn away from Kansas and restored to practically the same position it occupied before there was ever any shift in the river. Kansas, in other words, occupies physiographically the same relation to the river and to these disputed lands in Forbes Bend today that it did forty years ago, and its rights

> turn upon the legal relationship or political sovereignty which it claims to sustain to these lands, notwithstanding their present separation from Kansas proper by the Missouri River." (M. R. 18.)

This statement indicates the attitude of mind of the Master with which he listened to and construed the testimony. It indicates a feeling on the part of the Master that Kansas is making an unconscionable claim. The following statement shows that he felt it to be his duty to find some way to disallow the claim:

> "Bearing in mind the trend of the testimony touching the emergence of bar or island formations and the coincident development of two or more channels in Forbes Bend, it seems to be incumbent upon us to lay hold of some modifications or qualifications of the general rules governing accretion and avulsion and the normal effect of these processes upon watercourse boundaries, in order correctly to determine the rights of the parties to this controversy." (M. R. 66.)

With this attitude of mind and this announced purpose, the report of the Master becomes highly critical of the evidence introduced by the complainant. He assumes that there was a large bar or island (using the two expressions synonymously) emerging from the river and the development of a divided channel, and distorts the testimony to prove his case. The divided channel is con-

ceded by the complainant from and after March, 1917, when the first avulsion took place. The large bar which prior to that time was attached to the Kansas bank then and thereafter became an island. This is the disputed territory, comprising about 2,000 acres. It did not in fact "emerge" as an island but became an island by reason of the avulsion. The Master, however, says "That a large bar or island did form in the river would seem from the evidence to be incontestable." (M. R. 33.) To support this, he cites many witnesses who testified with regard *to an island*. However, much of this testimony related to 1917 and thereafter and did not in any way prove that the island "emerged" from the middle of the river instead of being created by the avulsion of 1917.

The Master was forced by the undisputed testimony to find erosion on the Missouri side of the river and that the river by that erosion ate into the Missouri bank to points about three miles from the original location of the river, yet he refuses to find that the current which eroded the bank was the channel of the stream, ignoring the expert testimony of the government engineers, Geiger and Staver, also ignoring the positive testimony of Ryan and ten other witnesses who walked out on the accreted land from the Kansas side.

The Master concedes that "there is evidence of widespread erosion, some evidence of accretion, and some slight evidence of avulsive action" (page 64), but builds his whole case upon his finding that an island *emerged* from the middle of the river.

The Master complains of the dearth of maps showing the shifting of the river, although Complainant's Exhibit 46, a War Department map, shows the right and left banks of the river in 1890 and the erosion or cutting of the left bank of the stream, showing the two banks of the stream in 1923 with a channel on each side of the disputed land, which at that time confessedly was an island. All of the disputed land is shown by the map (Comp. Ex. 46) to be clear to the north and east of the location of the left bank in 1890. It was not an island then; it was then Missouri farm land which was eroded for over twenty years and fell into the river. Later the river builded up as an accretion to the Kansas shore as it ate its way to the north and east nearly three miles as shown on said map outlining the left bank in 1923 and 1928. This also is shown by the Holt County, Missouri engineer, Peret, on his map, Complainant's Exhibit 55, as the "erosion bank."

Brief of Oral Testimony

The Complainant challenges that portion of the report of the Master which states that the land in controversy formed as an island. Assuming, but not conceding, that the land in controversy did form as an island, again we respectfully challenge that portion of the report of the Master which states that the island formed upon the left or Missouri side of the main channel or thalweg of the stream. Before making specific reference to the oral testimony in support of the allegations made by the complainant, we call attention to the use of certain language by the Master throughout his report. In numerous places throughout the report the Master uses the term "bar or island" as if the two words were synonymous. It is true that many of the witnesses testifying on behalf of the complainant spoke of the new accretions or land formations as a bar or bars. The witnesses did not mean an island, but rather meant a formation of land attached to the bank of the river. A reading of the transcript showing the oral testimony of the witnesses for the complainant fully reveals the meaning intended by the witnesses.

As above stated, under the theory of the complainant an island did not come into existence in this area until the first avulsion of 1917; and that prior to the avulsion,

the land which then became an island was attached to the Kansas bank. This first avulsion occurred in 1917 and was followed by a second avulsion at approximately the same place in 1928. Between the time of the two avulsions there was a divided flow of the river or split channel which created this island. Subsequent to the second avulsion, in 1928, the left or Missouri channel gradually filled in and ceased to flow. However, prior to the first avulsion, the principal flow, in fact all of the flow, of the water was near the left or Missouri channel, and the movement of this channel toward Missouri or toward the left was by erosion with the resulting accretion on the Kansas bank.

The complainant now desires to comment upon the evidence relied upon by the Master in his findings that the land in controversy originally formed or emerged as an island. The complainant believes that a complete study of the record will show that the Master has misinterpreted the oral testimony.

On page 34 of the Master's Report is a summary of the oral testimony of PARDEE DYER, but the direct statement of Mr. Dyer concerning the manner in which the land was formed is not shown in the report of the Master.

On page 198 of the original transcript is found this statement by the witness Pardee Dyer:

"Q. As this bar formed, did it form as an island or did it form as a part of the land?

A. No, this here formed is a part of the land.

Q. And land on which side of the river?

A. On the Kansas side."

Pardee Dyer continues on page 212 of the transcript:

"Q. You say there was a small channel in 1917 on the Kansas side?

A. Yes; there was a small channel, but it was dry in the winter time, that was practically dry, and, of course, in the spring when the water got up there would be several little tributaries through there, little channels.

Q. Well, after 1917 can you tell us where the flow of the water was?

A. After 1917, why, there was—I wouldn't know, just about as much come down the Kansas side as there was on the Missouri side."

Pardee Dyer continues on page 214 of the transcript:

"Q. After 1920 was there any change in the flow of the water at Forbes Bend?

A. Yes, it begun to—

Q. What was that change?

A. Well, that change went to the Kansas side.

Q. What went to the Kansas side?

A. The water.

Q. What happened to the flow on the Missouri side?

A. Well it gradually filled up."

On page 218 of the transcript (cross-examination):

"Q. When was it you first noticed that the Missouri river was cutting on the Missouri side?

A. Well, it was right shortly after we went there. (1892.)"

Pardee Dyer continues on page 219 of the transcript:

"Q. Then you say it gradually kept on cutting until it cut how far?

A. Well, I thought it was about a mile and a half back, could have been further.

Q. Was that done gradually?

A. That was done gradually.

Q. Over how many years did it take it to get as far East as it finally got?

A. Well, I wouldn't know how many years.

Q. Well, you lived there?

A. It has been cutting off and on ever since we have been there until—up until, Oh, I guess about 1928."

Pardee Dyer continues on page 220 of the transcript:

"Q. As I understand, your position is by 1917 and 1918 there wasn't any water on the Kansas side, is that right?

A. Up until 1917.

Q. Up until 1917?

A. Yes."

On page 34 of the Master's Report is a short summary of the oral testimony of CLARA DYER (wife of Pardee Dyer), showing that in 1914 the river "run on the Kansas side" (Tr. 1, 234). However, on page 236 of the transcript is found this oral testimony of Clara Dyer, who resided on the Kansas bank of the stream and had moved there in 1914:

> "Q. When it moved away from you what happened to the place in here where the channel had been?
>
> A. Well there was land.
>
> Q. You mean land filled in there?
>
> A. Yes—
>
> Q. Can you tell us how wide that land was between your house and the river after the river had moved to its farthest point?
>
> A. Well, no, I wouldn't know exactly how wide it was. (Tr. 1, 236.)"

The oral testimony of ED MARTIN is not summarized in the report of the Master, and is to be found on page 239 of the transcript. The testimony of Ed Martin concerns the erosion of the left or Missouri bank of the stream (Tr. 233, 234).

On page 34 of the Master's report is summarized the oral testimony of NETTIE MARTIN in support of the finding of the commissioner that the river always maintained a channel near the Kansas bluff or what is spoken of throughout the record as the Kansas side. However,

a thorough reading of her testimony does not warrant such a conclusion. In fact, her testimony is in contradiction with such finding. On page 250 of the transcript is recorded the oral testimony of Nettie Martin as follows:

> "A. It gradually made in land every year a little bit at a time, you know, gradually increased.
>
> Q. Do you remember when that started?
> A. No, I couldn't just tell you when it did start.
>
> Q. Can you give us an approximate year?
> A. No, I just couldn't. I think it commenced making in about 1906 or 1907. It increased some land in there along at that time. It was beginning, and I know before mother left there—
>
> Q. When did your mother leave there Mrs. Martin?
> A. I think it was in 1907, I think was the time."

Nettie Martin continues on page 252 of the transcript:

> "Q. Mrs. Martin, did you observe whether or not the river made any change up above your farm near the Pardee Dyer place in there?
> A. The land made more above Lafayette than it did down—in the last few years it has made in more from Lafayette out, made in more land, but it has been more made above than there was down below.
>
> Q. Did you see how that land was made in there?
> A. Well, all I can say is just the increase of the

land making in, you know, every year. There would be a strip made with a lot of willows on it, and next year there would be a little more added to it, just kept growing, you know."

Nettie Martin continues on page 253:

"Q. I will ask you this, Mrs. Martin, if you can tell us how wide that made land was at the widest point, just above your farm?

A. How wide?

Q. Yes, do you have a judgment as to how wide it was Mrs. Martin?

The Special Master: Has she called it made land:

Mr. Beck: Yes, she used the term 'made in'; that is the reason I spoke of it.

A. That would be—I am most sure that it must have made in a half mile or a little over a half mile across from the bluff to the water, river."

The oral testimony of GEORGE PRIDGEON next is summarized in the report of the Master. George Pridgeon was forty-nine years old, and moved with his parents to the Kansas bank of the river at Forbes' Bend in about 1900. His father was a farmer. George Pridgeon continued to live there until about 1913. He lived about a mile and a half down stream from the witness Pardee Dyer.

Q. From 1900 to 1913 when you were out there, did the course of the river change any opposite your place?

A. Well, it seemed to have, yes.

Q. What changes took place?

A. It seemed to form bar land; willows and cottonwoods grew up.

Q. Where?

A. Out in the—well, in the river, I would call it in the river bed out in the bar. I would call it a bar or river bed I don't know what you would call it."

George Pridgeon continues on page 263 of the transcript:

"Q. What happened at the right bank or the Kansas bank of the stream then (when river moved to Missouri side)?

A. Well, there were still sloughs through there.

Q. Did it move also?

A. Well, only—there wouldn't be much water there only during the high water, and that would fill up, of course, and after the water would go down, why, then it would just kind of—."

On page 35 of the Master's Report is summarized the testimony of ESTA SURLES (sister of the witness George Pridgeon) who lived on the Kansas side of the river near the land in controversy from about 1900 to 1913.

On page 267 of the transcript the testimony of Esta Surles is recorded as follows:

> "Q. Do you remember where the channel of the Missouri River was when you moved there in 1900?
>
> A. Well, it was pretty close to the house."

Then on page 269 is recorded the testimony of Esta Surles as follows:

> "Q. And during the 13 years that you lived there, can you tell us or do you have the judgment as to how far East the channel of the river moved?
>
> A. No, I really haven't got any judgment about that. I know we got willows in clearing off the ground. I remember that well.
>
> Q. Did you ever walk out across that land?
>
> A. Yes.
>
> Q. Well, will that give you any judgment as to how far it was?
>
> A. Well, it seemed to me like that when I had to walk out there it was quite a ways, between three-fourths or a half a mile or maybe further, maybe a mile from the house."

On page 35 of the Master's Report is summarized the testimony of W. M. DAVIES, stating that the witness speaks of sandbars in the river.

The testimony of W. M. Davies concerning sandbars is found on page 276 of the transcript and is as follows:

"Q. I am talking about Lafayette.

A. Well, Lafayette, I couldn't say just exactly. I think there was some form of bar throwed in there at that time, sand bar or something of the kind.

Q. Do you know how wide that bar was?

A. Well, no, I couldn't say.

Q. Well, back in 1900?

A. They were sandbars down below and the channel of the river was on the other side of those sandbars, because the boats, when they come backwards and forwards, went on the Missouri side of those sandbars and those sandbars were plain there. Anybody could see along there at that time.

Q. Where were those sandbars with relation to Lafayette?

A. Well, they were right opposite, some of them."

On page 35 of the Master's Report is summarized the testimony of KENNETH BROWNLEE, forty-two years of age. He testifies that he used a boat in fishing upon the river from 1921 to 1933, and that when he started fishing there in 1921 the flow of the river was divided.

On page 290 of the transcript is found the testimony of Kenneth Brownlee as follows:

"Q. And were there two channels down through there?

A. Yes, sir.

Q. Can you tell us how wide the Missouri channel was?

A. No, I would be afraid to say.

Q. Can you tell us how wide the Kansas channel was?

A. No, there was more on the Missouri side than there was on the Kansas.

Q. When you say there was more over there, what do you mean?

A. More water went around this chute than there was this one (indicating).

Q. You mean the Missouri channel was wider than the Kansas channel?

A. Yes, sir, deeper."

Then on page 291 of the transcript is found the following testimony:

"Q. Up until 1933 when you quit fishing there, did the Missouri channel of the river change any?

A. Yes, there wasn't any on the Missouri side then at all."

Beginning on page 36 of the Master's Report is summarized the testimony of Judge C. W. Ryan, the owner of an undivided interest in a farm known as the Lafayette farm on the Kansas bank of the stream, and a claimant to a portion of the land in controversy. His testimony is given considerable space by the Master, but we show the following additional testimony of Judge Ryan as found on page 313 of the transcript:

"Q. Can you remember when there was a divided flow out there, what year it was?

A. Yes, with this qualification; I remember very distincly the first time I saw it. I am not absolutely postive whether it was just before I went away to the training camp in 1917 or whether it was right after I came back in 1919. I was down there in front of Lafayette. I commonly walked out across those accretions to where the river divided, and I walked down there with the tenant.

Q. Just a minute—

A. And I saw water there for the first time that time.

Q. Just a minute, you spoke about walking down across the accretions there. Were you able to walk across them to the Kansas bank of the river?

A. Oh, yes, done it many a time. Now, there might be times if the water was high that you couldn't do that, you would run into water, but in ordinary stages usually you could walk clear across without getting wet to where the river was before it divided."

Then on page 316 of the transcript is found the testimony of witness Judge Ryan as follows:

"Q. Had you been on that island before it became an island, or had you been on that ground, rather, before it became an island?

A. Yes, I went across it from the bluffs, walked across from the bluffs many times. Sometimes in the winter when the sloughs would be frozen

over, there would be narrow shallow water in chutes or sloughs. Sometimes when you couldn't—sometimes I have walked off there and run into water in the slough where I would have to go back."

Then on page 318 of the transcript is found the testimony of Judge Ryan as follows:

"Q. Well, after the first time that you saw the divided flow here, was any change made in the Kansas channel?

A. Yes.

The Special Master: You mean by the Kansas channel, the channel against the Kansas bluffs?

Mr. Beck: The channel on the Kansas side of the island?

A. The channel, the Kansas channel that was cutting through, or the channel that was smaller in the beginning. That started in about 1917, that kept growing bigger, and the furthermost channel that had been the entire river earlier, that kept getting bigger but there were variations to that. I would go out there at times and go with the man on the place and ask him—get up on a high bluff, maybe, or go down on the bank and ask him which was the bigger channel, and there came a time when it was hard to tell, and he would try to tell me by the way the boats went, and there was a time when the boats, I think came both ways; (page 319) but the channel over toward the right bank, it might contract or the volume of water contract at times, but the general trend was for it to get bigger, but the northermost channel kept getting small, and

I was over there twice, that I know about, in 1931 and the channel was practically dried up. . . ."

Then on page 321 of the transcript is found the testimony of Judge Ryan as follows:

"Q. Do you know the manner in which the river moved to the North and to the East here at Forbes' Bend during all of the years you have been talking about?

A. Yes, sir.

Q. How did it move, Mr. Ryan?

A. By slow, gradual and imperceptible accretion to the Kansas bank, just the same as all the accretion land makes along that river.

Q. What became of the land on the left or the Missouri bank of the river?

A. It fell into the river and nobody knows where it went. It might have gone to New Orleans, or might have gone a few miles, went many places I presume."

Then on page 324 of the transcript is found this testimony of Judge Ryan:

"The Special Master: Just like that for three miles and a half up to this landmark here (indicating)?

A. Something like that distance, yes, sir.

The Special Master: And that that did not come about by occasional cutting through of the river at different points until it finally reached that point?

A. No, I am positive, Judge, there is no question about that?"

The evidence of the witness Judge Ryan is fairly well abstracted in the brief in behalf of the complainant filed with the Master, and is shown beginning on page 60 of that brief, which we trust will be available to the court.

On page 38 of the Master's Report is the testimony of JOHN H. PERET, an engineer and surveyor for Holt County, Missouri, which is located on the lefthand bank of the river at the place in controversy. On page 371 of the transcript also is found testimony of John H. Peret as follows:

"Q. Did you have occasion to observe this land that went into the river, observe whether it was the water or land there in those sections that are now marked as accretion during that period?

A. Well, it eroded back; sometimes it would drop off or erode back further in one place than in another, and as it would eat into the bank, as we call it, the channel would follow that bank, get closer to it, and something might catch in the channel out farther, logs and drift, and debris would catch, and a bar would form. This land doesn't form next to this erosion bank. There is only one instance in Holt County that I know of where it piled up against that high bank. This was about the first bar that was started that I show in a broken line there, and I put on it something about "squatters." That showed up out there, and

when I surveyed that there were trees there, cottonwood trees, ten, twelve inches in diameter on that ground, and there is a channel left, water left over after bars begin to form. These bars form in the direction of the flow of water. For instance, some of these bars up here that formed ran easterly or northeasterly and southwesterly. Other bars, when the river straightened out in a southeasterly course, would form parallel to that flow of water. In these channels or sloughs in between those bars and islands would fill—that is where we get the idea of accretions. It is not accretion to this bank up here, (indicating). It doesn't do that in the Missouri ' ver, not on the Missouri side, the only side I know anything about, but it forms bars out here in this channel that is broadened by eroding into the bank and in between these bars will catch drift and silt and sediment, and close them up, and invariably throughout its course where it follows around the erosion bank it leaves low places, and there are low places there today, and there are high places in that, that have cut the swirl of the current and deposited silt and stuff. As this river cut back something happened on the other side of the river that pushed it in a northeasterly course. If you study the Government field notes on the Missouri side and come farther west, than this map shows, the course of the river was easterly and northeasterly when the Government surveyed it in 1939 and 1940."

On pages 33 and 74 of the Master's Report is quoted some of the evidence of HOWELL E. GEIGER, an engi-

neer for the United States Government. The complainant feels it only fair here to quote additional testimony of Mr. Geiger as it continued from where the Master terminated it on the top of page 75 of his Report. Following the answer of the witness Geiger on the top of page 75 of the Master's Report is the next question as shown on page 123 of the transcript:

> "The Special Master: Give me the mid-channel right here (indicating) where is it; where is the mid-channel?
>
> A. We would have to study above and below, Your Honor, most likely 13 in this range.
>
> The Special Master: Is that feet?
>
> A. Yes, sir, 13 feet.
>
> The Special Master: And where, then, does it continue? Does it continue on the West or North or South side of this low island here?
>
> A. It is indicated by these soundings that it continues on the Missouri side in this case, or on the left bank.
>
> The Special Master: Left bank coming down the stream?
>
> A. Yes, sir."

On page 39 of the Master's Report is summarized the testimony of JOHN KOTSCH. In speaking of the accretions which had attached to the Kansas bank, the wit-

ness John Kotsch testified as follows, and it is to be found on page 413 of the transcript:

> "Q. And how far in your estimation would you say that the river had made land?
> A. In the time—
>
> Q. How far from the Kansas bluff line?
> A. To the last time, how far over?
>
> Q. Yes.
> A. I should judge it was around two miles over there, might have been more, or might have been less. I couldn't say; that is kind of a guess.
>
> Q. In measuring your two miles, please state where your beginning point is, that is, your point of observation was, and in what direction you are making your measurement of estimating two miles?
> A. I am measuring from where Kunkel's house was at the old Ryan place, north and east. You might say more straight north, pretty near, but it run north and east both."

John Kotsch further testified that some of this outlined land had been put on the tax rolls by him as trustee of Center Township, Doniphan County, Kansas.

On page 40 of the Report of the Master is summarized the testimony of JOHN COUFAL concerning the condition of the river in 1929. The testimony of John Coufal bears out the theory of the complainant which is that an island was in existence in 1929. The witness John Coufal

went to live upon the Kansas bank of the stream after the creation of the island, and it is the theory of the complainant that the island was created in 1917 by avulsion. So in reading the summary of the evidence of the witness John Coufal as continued in the Master's Report it should be remembered that this witness is testifying concerning the condition of the river subsequent to the avulsion of 1917, and subsequent to the creation of the island by that avulsion. The witness John Coufal does bear out the theory of the complainant that the principal channel continued on the Missouri side of this island after the first avulsion.

On page 41 of the Master's Report is summarized the testimony of MRS. JOHN COUFAL. She also is testifying concerning the condition of the river after the first avulsion of 1917.

The report of the Special Master makes no reference to the oral testimony of MRS. SAM JENKINS who was fifty-eight years old and lived on the Kansas bank of this stream from 1910 to 1912. Her testimony concerning the bar island is as follows, and is found on page 446 of the transcript:

> "Q. At the time you lived there, state to the court, if you will, how much, if any, land there

was in front of the bluffs close to the Ryan property?

A. Well, there is a long ways out there, I said it is a mile to walk. We walked to the river many a time and there is a lot of bar land to go through."

The oral testimony of JOHN H. SIMPSON is summarized on page 41 of the Master's Report but the complainant desires to insert more of the record covering the oral testimony of the witnes John H. Simpson, particularly concerning the formation of the bar land. The witness John H. Simpson testified that he fished up and down the river.

On page 455 is reported the oral testimony of witness John H. Simpson as follows:

"Q. Will you tell us what those changes were?

A. Well, the bar continued to go on out, the river receding toward the Missouri more and more there, I don't know just how, what time it stopped or anything like that. I am not postive in regard to that.

Q. Did you see any cutting during those years?

A. Yes, sir.

Q. Into which bank was the river cutting?

A. Usually on the other side, on the Missouri side.

Q. Did you walk out on that land any opposite the Lafayette farm when you were fishing out there?

A. Yes, sir.

Q. Was there a channel of water down through there when you first went out there in 1910?

A. Through the bar, you mean?

Q. Yes.

A. No, sir, I don't think there was.

Q. What I am trying to get at; could you walk on the bar clear out on the Kansas—

A. (Interrupting)—yes, you could walk.

Q. You could walk right down to the river bank?

A. Yes.

Q. There wasn't any water in the bar during the ordinary flow of the river?

A. No."

Then on page 456 of the transcript appears the oral testimony of the witness John H. Simpson, as follows:

"Q. I wonder if you could tell us how wide those channels were during the years that you fished in there when there was a divided flow of the river?

A. No, I wouldn't know just how wide they were. Of course, the south or the Kansas channel was a narrower channel, and the main channel was around on the Missouri way."

On page 41 of the Master's Report is summarized the testimony of RAYMOND ELMER SIMPSON. The Master is attempting to show that the Kansas channel was the larger in 1918, but Simpson first noticed the divided channel in 1917 or 1918. The testimony of the

witness Raymond Elmer Simpson not referred to by the Master is positive concerning the attachment of the accretions to the Kansas bank of the stream, and will be found on page 465 of the transcript as follows:

"Q. How far had it moved by 1911 or '12?

A. East and North, it moved quite a ways, I would say a mile. It was right there at Pardee's, it cut in towards his place, that is Mr. McKay's place and Dyer's.

Q. What did it do opposite the Cole place?

A. It gradually kept cutting over on the Missouri shore down to this school house you was talking about, you know.

Q. Which school house?

A. That is the Baker School, I think.

Q. Which side of the river was it on?

A. On the Missouri side.

Q. Did it ever reach the Baker schoolhouse?

A. Yes, sir.

Q. Do you know about what year?

A. Somewheres near '13, I think.

Q. When you say '13' you mean 1913?

A. Yes, sir, 1913.

Q. When you went down there first, and during all these times that you were going down there, did you walk out across the bar?

A. Yes, sir, in 1912, I did, in the spring of 1912 I walked right out.

Q. Did you find any water there?
A. None whatsoever.

Q. How far did you walk out across that bar?
A. Oh, it is a good long ways, it is right straight west of where that school stood."

(Page 466 of the transcript):

"Q. How far? Do you have any judgment how far it was across there?
A. It must be a mile or mile and a half from Lafayette out there.

Q. That was when you walked across there in 1912?
A. Yes, sir."

Then continuing his testimony as shown on page 469 of the transcript the witness Raymond Elmer Simpson testifies as follows:

"Q. It didn't happen —
A. (Interrupting) It happened in there about the time I was in the army, because it was all dry in there when I went.

Q. What was dry?
A. This here Kansas channel that they was talking about there from Cole's, that was dry. You could walk out clear out to that school, and then when I came back in 1918, why, practically all the river was over there.

Q. You mean now, 1917, that there was no water, except over on the Missouri side?
A. Absolutely."

On page 42 of the Master's Report is summarized the testimony of JOHN BOTTINGER, who was a County Commissioner of Doniphan County, Kansas, and who hunted ducks along the river. Since his hunting took him down upon the river bank and into the water his testimony concerning the movement of the river in the formation of bar land is enlightening. On page 478 of the transcript is found his testimony as follows:

> "Q. Did you, while hunting, have occasion to walk upon any of that land?
>
> A. Well, just in the upper end of the bar is where we were doing our hunting, about opposite the McKay land and the Pardee Dyer land on the Kansas side."

(Page 479 of the transcript):

> "Q. How far out on that land could you walk at that time?
>
> A. Well, you could walk out there a long ways I would say. We went out there and hunted one day for geese, and I would say we walked out there a mile; I would say it would be a mile.
>
> Q. And in that distance of a mile from the bluff on out, did you have any occasion to cross any water?
>
> A. Yes, we waded in a little water. Of course, we had on our hunting boots. There was a depression between what you would call the second bottom, I guess, where we had our tent, you would

go across. There was a kind of a depression you would have to go through and there was some water in there.

Q. Was that still water or flowing?

A. I think it was flowing a little. Of course, now, let's see, that was in the wintertime; if it was, you couldn't hardly notice it. I doubt whether it was. I would call it more of a slough.

Q. Are you able to tell at that time where the greater portion of the water in the Missouri River was flowing, as it related to that land?

A. Yes, in 1912 and '13, it was there at the point where we hunted, just above Pardee Dyer's house, it went northeast, the main river—well, all the river."

The witness Paul Bottinger then testifies concerning his side of the river again in 1919 or 1920, and this testimony is reported on page 480 of the transcript:

"Q. When you went down the river there in 1919 or 1920, did you observe whether any changes had taken place in the flow of the river as compared with the flow when you were there previously, in 1914 or 1915?

A. Yes.

Q. What was that change?

A. Well, it was quite a change. You wouldn't hardly know it was the same place there. It was a strong current through right by the cottonwoods there where we had our tent in 1911 and '12; where you could just walk out, you have to take a boat

to go across, probably—I am a poor judge of water—probably five or six or seven hundred feet, you would have a strong current.

Q. Was there any flow north and east of the bar land then?

A. Yes, yes.

Q. How far over would you say the flow of the river was in the northern Missouri channel as relates to any point in Missouri?

A. Well, it was a good mile across to this other channel. This other channel hadn't changed. I couldn't say the old channel, where is was in 1912, was still there. There probably wasn't near the water in it there was, because most of it was coming through the Kansas side in 1920. Of course, I don't know how deep it was. I didn't go over there on the Missouri side, on the Missouri channel on the Missouri side going northeast."

On page 42 of the Master's Report is summarized the testimony of CHARLES BASKINS, who remembers the river as far back as 1898. His testimony concerning the movement of the river is enlightening, and will be found on page 495 of the transcript:

"Q. How far did the river move in those years, Mr. Baskins?

A. Well, in them times, there about Lafayette, it must have run all the way from right close to a couple of miles, right across from Lafayette. Why, I know it must have been a couple of miles, there was a school house, and my cousin taught

school over there, and that school house cut in this side of Joe Collier's land here at Lafayette. We used to cross there lots of times.

Q. Do you know the name of that school house?

A. Baker's School House.

Q. What formed on the Kansas bank of the river as it moved over, Mr. Baskins?

A. Well, just the willows come in there, and the ground was there and growed up high.

Q. What came in there before the willows?

A. What came in there before the willows? The dirt had to come before the willows, then the the little willows just growed up and just gradually swept out the land this way, as the river went away from Kansas there.

Q. Did you ever walk out on that land opposite Lafayette?

A. Yes, I walked all the way from a mile and a half to two miles right across from Mr. Cole's when the river went away around up that way, over in what you would call Fortescue or Curzon Switch, whatever you call it. That is what I call it."

(Transcript 496):

"Q. Could you walk down to the bank of the river, Mr. Baskins, on the Kansas side?

A. Along in 1913, 1914, there was no water right close this way. It went away and after that water jam came in there in 1917 then it seemed to split that channel and the channel came back

here to the Kansas side and begin cutting on the Kansas side through here (indicating), and there was some timber in there and they got busy and got it cut off and down to the mill and got away with it."

On page 43 of the Master's Report is summarized the testimony of GEORGE ATKINSON. As indicated by the Master's Report, the witness George Atkinson testified that at the time he moved to this area in 1926 the boats followed the channel on the Missouri side of this island and that channel was considered the main channel.

On page 43 of the Master's Report is summarized the testimony of JOHN E. SIMPSON and a statement here is made by the Master that apparently the witness in speaking of the two channels where one formerly had been means two channels on the Kansas side of the stream.

The complaint states that the testimony of the witness as found on pages 525 and 526 of the transcript concerns the first avulsion of 1917 and should be interpreted to mean the cutting of the second channel across the base of the bar land as it was attached to the Kansas bank of the stream and the witness really speaks of the second or new channel which then formed and which then created the island.

On page 44 of the Master's Report is summarized the testimony of ISAAC MUSE.

On page 44 of the Report of the Master is summarized the testimony of the witness, CLYDE McWILLIAMS. This witness was a rural mail carrier who delivered mail on the Missouri side of the stream along the area in controversy. He first began delivering rural mail in that area in 1906, and since he made almost daily trips down through there, had an opportunity to observe the changes in the river.

On page 579 of the transcript is reported the testimony of Mr. McWilliams, as follows:

> "Q. When was that?
>
> A. Well, the last time was while I was working on the river; they had a steamer to dredge out, to wash the banks out where we were going to work and we would ride on it sometimes.
>
> Q. That was in 1934?
>
> A. Yes?
>
> Q. Which side or channel of the river did you go up in?
>
> A. We went up on the Missouri side.
>
> Q. In 1934?
>
> A. Yes.
>
> Q. Did you see, prior to that time, steam boats going up the Missouri side?
>
> A. Yes, a number of different times.
>
> . . . . . .

Q. Was there a split channel? We are talking about, in evidence here, that the channel was split.

A. Well, that is the bar I told you about; that is what you might call a split channel. The water was on both sides but the main channel was on the Missouri side."

Then on page 580 of the transcript of the testimony of the witness, Clyde McWilliams, is reported as follows:

"Q. When there wasn't any water along the Kansas side from Wolf Creek on down to Lafayette past the Dyer place, to the left?

A. Well, around what is called the Dyer bar, that closed up, in my recollection. There was no water run around there any more."

On page 46 of the Report of the Master is a summary of the testimony of WILLIAM R. HATCH, used in support of the finding that an island existed in the area in controversy. The witness William R. Hatch worked upon the very island which the complainant states was formed as accretions and did not go upon this land until 1928 or 1929 at which time this island was in existence as a result of the first avulsion of 1917.

On page 46 of the Report of the Master is summarized the testimony of LOUIS F. STALCUP who was a former sheriff of Holt County, Missouri and a farmer at the time he testified. Since he was a resident of the State of

Missouri and had an opportunity to watch the river his testimony is fairly representative of the contention of the complainant concerning the movement of the river by erosion into the State of Missouri.

Concerning the action which took place on the Kansas side at that time the testimony of the witness LOUIS F. STALCUP, as shown on page 639 of the transcript, is:

> "Q. When the river was cutting into the Missouri bank down there, do you know what was happening, if anything, on the Kansas bank of the stream?
>
> A. It was filling in on the other side, the river commenced cutting up in the Shaffer district."

On page 47 of the Report of the Master is summarized the oral testimony of GEORGE LARSON then sheriff of Doniphan County, Kansas (who with his deputy sheriff within the last sixty days disappeared in a snow storm while hunting ducks on the Missouri River and they have not been heard from or seen since that time). The witness George Larson testified that he was not familiar with the river prior to the year 1926, however, he did testify that at that time the river channel was on the other side (Missouri side). The evidence is reported on page 659 of the transcript:

> "Q. Do I understand that you say in 1926 and '27 the river was next to Cole's place?

A. No, sir, the river was on the other side. Then, along about—I judge it would be along about '31 or '32, somewhere in there, the river was on this side. I don't just have the years right but I know it was just vice versa the way it was the first year."

On page 47 of the Report of the Master is summarized the testimony of CLIFFORD COUFAL, and it is to be remembered that the witness Clifford Coufal first knew of the land in controversy in 1929 when he lived on it with his father who farmed it as a tenant of the Kansas riparian owner who claimed it. Clifford Coufal does testify concerning the second avulsion because he was on the land at the time it happened.

He states that at the time he went on this land the biggest end of the channel was the Missouri channel.

The testimony of A. F. HAYS is summarized on page 48 of the Report of the Master, but in this connection it is to be remembered that this witness first became familiar with the territory in controversy in 1920, which was after the creation of the island by the first avulsion of 1917. The witness does state that "the main part of the river at that time was on the north part of the big bar. There was very little water at that time in between the main bar and the Ryan place." (Transcript 680.)

Then, in speaking of the amount of the water on the Kansas side of the bar at that time the witness stated "it would carry a boat with an outboard motor. I would say there was four or five foot of water there, but there are times in cold weather when it was pretty dry. I have hunted geese on the channel there when it was perfectly dry." (Transcript 681.)

On page 48 of the Report of the Master is summarized the testimony of JOHN B. GRAY, a Missouri witness, but this witness was a hunter and did not become familiar with the location of the river in the area in controversy until 1922 long after the avulsion of 1917.

On page 48 of the Report of the Master is summarized the testimony of DAVE BARBOUR, a Missouri witness, and in this summary is the statement that the river had a divided flow beginning along about 1903. The witness did make this statement on page 723 of the transcript, however, upon cross examination and as shown on page 739 of the transcript the witness testified:

> "Q. I believe you said that the river had a divided flow down there in about 1903?
>
> A. Well, no, not in 1903. I didn't mean to imply that it had.
>
> . . . . . .
>
> Q. When did they first have a divided flow there, as you remember it?

A. Well, along about, Oh—well, you see, I came back in 1914 from Colorado, and I am pretty sure the channel was divided there then a little bit on the north side of the island, and quite a lot of channel on the south side."

On page 49 of the Report of the Master is summarized the testimony of R. L. GREENE, a Missouri witness. This witness obtained a patent in Holt County, Missouri to a portion of the land in controversy, and is a Missouri claimant to a portion of the land in controversy.

On page 49 of the Report of the Master is summarized the testimony of CARL HARRISON, a Missouri witness. This witness resided in the State of Missouri, and his place of residence was below the area in controversy. On page 766 of the transcript he says that he is not familiar with the territory between Wolf River and the Ryan place and this is the area in controversy. He says that he is familiar with the river below that and on the Missouri side of the stream.

On page 50 of the Report of the Master is summarized the testimony of CLARENCE HARPER, a Missouri witness. This witness resided in Missouri and states that he was 15 years of age at the time he first remembered the river about 1915. This witness states that in 1923

the flow of the river was evenly divided and his testimony is (Transcript 777):

> "Q. How wide was the channel on the Missouri side in 1923?
>
> A. It was about half that much, about half the channel, as much on the north side as there was on the south."

The Report of the Master does not include a summary of the testimony of CLAY HUDGINS, a Missouri witness, who was a resident of the State of Missouri, and a claimant to a portion of the area in controversy under a patent issued by Holt County, Missouri, for approximately 160 acres of land. His testimony was that about 200 acres of land owned by his folks had been cut in the river. Then concerning the divided flow of the river he testifies (Tr. 783) as follows:

> "Q. How long do you recall that the flow of the river was divided?
>
> A. Well, I think—my earliest recollection of it being divided was about 1915, the flow of it."

On page 50 of the Report of the Master is summarized the testimony of BRYAN HUDGINS, a Missouri witness, who is a Missouri claimant to a portion of the land in controversy. On page 806 of the transcript the testimony of the witness is as follows:

"A. The water continued—the island appeared, to my earliest recollection, there in the river about 1914 maybe '15."

Then the witness testified concerning the size of the Missouri channel (Tr. 801) as follows:

"Q. How long, in your judgment, did the flow of the river continue to divide or to flow in a divided manner?

A. Well, in '19 I would say, I believe I saw the last steamboats, about the only ones I saw in 1921 and '22 on the Missouri side; I recall two or three boats entering the Missouri side of the river near our farm; whether or not they went on through, I don't know."

On page 50 of the Report of the Master is summarized the testimony of ED McCOY, a Missouri witness, who was a resident of the state of Missouri. He testified that he never was on the Kansas side of the river, and that he lived below stream from the Hudgins, which was down stream from the area in controversy.

On page 51 of the Report of the Master is summarized the testimony of AVON H. MURRAY, a Missouri witness, who testified that he lived upstream from the area in controversy. His testimony concerning the flow of the river indicates that the stream actually flowed on the Missouri side for he testified (Tr. 827) as follows:

"Q. Right across the road. That was in 1915 that you moved there?

A. Yes, sir.

Q. State whether or not the flow of the river was divided at that time?

A. Well, it was partly divided. There was a small island out in the river, but the river was hitting over against, toward Wolf River, and that was throwing it back in southwest of where I lived."

(Tr. 828):

"Q. And cutting into the Missouri bottoms?

A. Yes, sir. We started to do some work along the river to prevent it from cutting, but we couldn't finance it enough. We built several deflectors, as we called them, and put in there."

Then on page 829 of the transcript the witness testified:

"Q. How long did the river continue to cut to the east and the north?

A. To the east and north?

Q. Yes.

A. Continued until 1922 or 1923."

On page 51 of the Report of the Master is summarized the testimony of JOHN GUYER, a Missouri witness and a claimant to 120 acres of the land in controversy. In the Report of the Master, and in the last line of the paragraph summarizing the testimony of John Guyer, is the

statement that the river also had a divided flow in 1922 or 1923. The witness testified (Tr. 841):

"Q. Do you have any judgment as to when the river first had a divided flow?
A. It divided both ways there.

Q. When was that?
A. Along about '22 or '23.

Q. 1922 or '23?
A. Yes.

Q. Is that the first time you saw a divided flow out there?
A. Yes."

On page 51 of the Report of the Master is summarized the testimony of RALPH DYER, a Missouri witness. On page 844 of the transcript is shown the evidence of this witness, stating that there was just about as much water on one side as there was on the other after 1914, and it continued that way up until about 1923 or 1924.

On page 52 of the Report of the Master is summarized the testimony of JAMES FITZGERALD, a Missouri witness, who was County Assessor of Holt County and put the land in controversy upon the Missouri tax rolls. He testified (Tr. 851) that he lived on a Missouri farm near the river in 1915 and 1916, and that he recalls loca-

tion of the river at that time. Then on page 852 of the transcript he testified as follows:

> "Q. Do you ever recall seeing the river when the flow was divided?
>
> A. Yes, sir.
>
> Q. When was that?
>
> A. Well, that was—I was better acquainted with the river in later years than that but it was divided, to the best of my knowledge, around '18, '19, '20, '21, along in there.
>
> Q. Did you observe the river when it was flowing in two channels?
>
> A. Yes, sir.
>
> Q. Can you tell me what year it was when you first saw it when it was divided?
>
> A. No, not exactly. I would say around, probably, '18, maybe '17."

On page 52 of the Report of the Master is summarized the testimony of HARVEY H. HALL, a Missouri witness, and as there stated the witness testified, (Tr. 862) that in 1916 the Missouri river was located on the Kansas side right along by the bluff. Then the witness states that in 1919 the flow of the river was evenly divided. (Transcript 873.)

On page 52 of the Report of the Master is summarized the testimony of WILLIAM METCALFE, a Missouri

witness. He testified concerning the flow of the river as follows (Transcript 876):

> "Q. Did you ever see the river when there was a divided flow in that locality which we call Forbes Bend?
>
> A. Yes, sir.
>
> Q. When was that?
>
> A. The first I noticed of it was, to my knowledge, 1916."

He says the flow was about evenly divided at that time and that condition continued until about 1920.

On page 52 of the Report of the Master is summarized the testimony of ED COTTON, a Missouri witness. However, he states that he first remembers the river in 1920. (Transcript 889.)

On page 52 of the Report of the Master is summarized the testimony of VERDE HARRISON, a Missouri witness. This witness stated that he lived in the neighborhood of Forbes, which is on the Missouri side, from 1914 to 1922, and that there was more or less a divided channel at that time. He further states that he left that vicinity in 1922, and when he returned there in 1928 the channel was on the Kansas side.

On page 52 of the Report of the Master is summarized

the oral testimony of RAYMOND DYER, a Missouri witness. He testified as follows (Transcript 898):

> "Q. In 1914, when you got back down in there, can you tell us where the Missouri River was located?
>
> A. Well, I think it was pretty much on the Kansas side at that time.
>
> Q. Was there a divided flow at that time?
>
> A. I just couldn't tell you at that time whether there was or not.
>
> Q. Did it afterwards divide?
>
> A. Yes, I remember afterwards it did.
>
> Q. What year, do you think?
>
> A. Well, as I remember it, it was about '18 or '19."

The witness stated that he moved from the river to the hills because the river was caving in the Missouri banks. (Transcript 906.)

On page 53 of the Report of the Master is summarized the testimony of MRS. MUREL DYER, a Missouri witness, with the statement that her testimony agrees with that of her husband. This witness lived on the Missouri side of the Missouri River below the Hudgins' farm which was down stream from the area in controversy. She stated that she was 6 years old in 1916 and that she did recall the river at that time. (Transcript 910.)

"Q. You do? Where was it when you recall the river at that time, where was it located?
A. On this side, on the Missouri side. There was a channel on both sides, rather."

On page 913 of the transcript in reply to a question asking if she ever saw any boats go up the Missouri side she stated:

"A. They have gone up the Missouri side—I wouldn't know just what year."

On page 53 of the Report of the Master is the statement that the testimony of CLARENCE DINWIDDIE, a Missouri witness, testified about the same as did Mrs. Murel Dyer. On page 291 of the transcript the testimony of Clarence Dinwiddie is reported as follows:

"Q. Then from 1922 to 1930, can you tell us if there were any changes in the Kansas channel of the river or the south branch?
A. Yes.

Q. As to the flow of water?
A. Yes, that gradually became the river.

Q. Gradually took the water that had been going down the northern branch?
A. Yes."

On page 53 of the Report of the Master is summarized the testimony of CLATE SCHAEFFER, a Missouri witness. This witness stated (transcript 973) that the

place where he was born and raised was cut into the river. This witness testified (transcript 941) that he last recalled a flow of water down the Missouri channel about 1916 or 1917.

On page 53 of the Report of the Master is summarized the testimony of MRS. EDNA SCHAEFFER, a Missouri witness. This witness testified (Transcript 947) that she did not become acquainted with the river in the area in controversy until about 1925.

On page 53 of the Report of the Master is summarized the testimony of W. L. MOORE, a Missouri witness. He testified (Transcript 955) that from 1908 to about 1912 the river was over by the Kansas bluff. His family owned land on the Missouri side, and this witness is a claimant to some land in the area of controversy. (Transcript 961.) Concerning the time in which the river divided its flow, the testimony of the witness is found on page 957 of the transcript:

> "Q. Is it 1918 you are talking about now?
> A. Yes, right along in there.
>
> Q. Let me ask you this: Had the river divided in its flow by the time you are talking about?
> A. The river had divided along about that time some. Mill Creek came in there and went out west of Hudgins' house."

On pages 961 and 962 of the transcript again is found the testimony of the witness to the same effect.

Beginning on page 66 of the Report of the Master and continuing on to page 72 is summarized the testimony of KENNETH ROBINSON and JOSEPH H. GRAY who resided in St. Joseph, Missouri, and who hunted together on the Missouri River in the area in controversy beginning in the year 1922. Their testimony is direct, positive, and seemingly more in detail than the testimony of other witnesses, but by piecing together the testimony of other witnesses who knew about certain movements of the river at certain times, it is found that the witnesses Robinson and Gray were accurate in their testimony. They used a boat and walked out over the land in this area as well. The testimony of these two witnesses supports the theory of the complainant concerning the divided flow of the river and the manner in which the flow shifted from the Missouri side back to the Kansas side.

On page 589 of the transcript is reported the testimony of the witness Robinson as follows:

> "Q. And in 1922 was there more than one channel in the river? Did it have more than one channel?
>
> A. There was.

Q. And where was the other channel in reference to the one to which you have just referred, being a quarter of a mile or so from the Burlington tracks?

A. May I ask if an explanation is in order?

Q. That is right.

A. Or shall I merely answer the questions?

Q. What I am trying to get at, in what direction was the other channel to which you have referred, as near as you can give it?

A. Well, at that time, speaking in 1922, the channel of the river divided at the upper end of what has been (transcript 890) spoken of here as the Dyer Bar, which is a point perhaps three-quarters of a mile to a mile below the mouth of Wolf River, and a minor channel, which we speak of as a chute, definitely not a major channel of the river.

. . . . . .

Flowed around the Kansas or south side of the so-called Dyer Bar and again joined the main channel of the river at the point previously referred to about a mile above Skeeter Creek.

Q. At that time—we are speaking now of 1922—about how wide was the channel of the river that flowed closer to the State of Missouri? We will call that the north channel.

A. All right.

Q. How wide was that channel ?

A. Oh, it would vary, of course, in its flow around this bar, would vary from, I will say, an average of half a mile.

Q. And then how wide was the south channel?

A. From, at one particular point, as narrow as 100 feet.

Q. And at that time were there any boats plying the river?

A. Oh, yes, frequently.

Q. In which channel did you observe the boats?

A. At that time all in the north channel."

On page 598 of the transcript is reported the testimony of the witness Robinson as follows:

"Q. Could you tell in your trips out there from year to year that the flow was gradually diminishing in the Missouri chute or channel?

A. Well, if 'gradually' means over a period of two or three years."

The witness Joseph H. Gray testified that they had been hunting down stream from the area in controversy after the World War, and in 1921 decided to move up stream into the area in controversy preparatory to changing the hunting site, the witness testified as reported on page 603 of the transcript concerning his explorations:

"Q. Tell the court briefly what part of the territory you explored at that time before locating your new camp.

A. When we left Mosquito Creek to go up the river to look for a place to hunt, we first went through what we called the Kansas chute. It was a small stream of water that ran from a little above

Mr. Dyer's farm and joined the main river about a half a mile above the mouth of Mosquito Creek. We had great difficulty in getting through there with our boat.

Q. What kind of a boat did you have?

A. We had an inboard motor boat.

Q. How much water would that motor boat draw?

A. It required about a foot of water to operate.

Q. After that time and about the same time did you explore the other channel of the river?

A. We did.

Q. Tell the court the location of this other channel that you explored.

A. The location of the channel in (transcript 604) 1922, I will start in, for instance, at the mouth of Wolf River.

Q. All right, sir.

A. The river ran from the mouth of Wolf River northeast, more east than north, in almost a straight line to within about a half a mile of the Burlington Railroad tracks, where it turned and went almost directly south. It turned at a point near what was known as the Hall farm to turn south. It then went against the bluffs about a half a mile north of Mosquito Creek.

Q. On the Kansas side?

A. On the Kansas side.

Q. In 1922 what was the width of the Missouri River over the course you have just described?

A. That was approximately, I would say, five-sixths of the river. It was about a half a mile wide.

Q. The other one-sixth of the river coming through the chute that you have previously described?

A. That is correct.

Q. As being on the Kansas side?

A. On the Kansas side. . . ." (Transcript 605.)

"Q. Explain to the court the nature of the land between what you have described as the Kansas chute and the Missouri channel?

A. It was an ordinary river bar with heavy growths of willows, a lot of driftwood on it, cottonwoods also growing on this, some cottonwood trees on that bar at that time were probably six, eight inches in diameter.

Q. Do you have an opinion as to the extent of the size of that bar, extent or size of the bar?

A. The bar at that time—my estimation would be more than two miles long and approximately a mile wide.

. . . . . .

Q. Where is your cabin now located?

A. It is located about a quarter of a mile near the bluffs than where we originally located it.

Q. On whose farm?

A. On Mr. Dyer's farm.

Q. After the time of your location in 1922, I will ask you to state whether or not there was any

change made in the course of the Missouri River at this point.

A. In 1922, as I recall, it did not change materially, but in about '24 or '25 this chute (transcript 606) became even smaller, what I refer to as the 'chute' is the Kansas chute.

Q. All right, go ahead.

A. And in the winter time it would get so low that it completely would go dry after the freeze would come, and naturally when the water would get a little higher, run through this chute again. Then in about '27 or '28 the water began running through this chute and it widened and the river on the north side of the bar gradually filled up and finally stopped running."

Then, in his testimony in answer to a question asking if the land comprising that bar ever disappeared the testimony of the witness is reported on page 607 of the transcript as follows:

"A. There is a part of that that entirely disappeared, but the main portion of it, the large portion of it where Cole's farm and all that part is opposite, it did not disappear.

The theory of the complainant is that the Missouri River gradually moved toward the north and east by eroding the left bank of the Missouri River, and at the same time formed accretions to the right bank of the Missouri River in the area in controversy. This

process continued from about 1900 until about 1926. However, in 1917 an ice jam at the upper end of the bar created a dam which impounded water, and this water finally broke loose and created a new channel back near the Kansas bluff line and about where the river had flowed subsequent to the year 1905. From that time on for the next several years there was a divided channel of the river in this area, and a left channel where what has been referred to as the Missouri channel, continued to move toward the east and north, and the left bank of this channel continued to erode following the river. Then about 1928 a second ice jam formed at about the same place where the first ice jam formed in 1917. The water again was impounded and broke loose through the Kansas chute or channel enlarging it and making it the main channel from that time on.

An examination of the transcript shows that the testimony of the Kansas witnesses is positive and direct and somewhat in detail, but that the testimony of the Missouri witnesses was usually made in general statements, and the record shows that the Missouri witnesses were asked many leading questions on direct evidence. The facts will be found in the questions and not in the answers to them which usually were in the affirmative. They merely affirm the facts stated in the questions.

The fact that the left channel or the Missouri channel continued to erode to the left bank after 1917 should be conclusive evidence that it carried the major portion of the water.

ALLEN P. STAVER, who is an engineer for the United States Army and employed on the Missouri River, testified as follows (Tr. 981):

> "Q. Mr. Staver, is it usually true where the river erodes one bank, it is depositing silt on the opposite bank?
> A. That is right, sir."

Then again Mr. Staver was asked where the deep water of the river usually flows, and his testimony is shown on page 1023 of the transcript:

> "The Special Master: Does the deep water of the river generally follow the concave side of the bend?
> A. Yes, sir."

Ice Jams of 1917 and 1920

(Tr. 203.) PARDEE DYER testified there was an ice gorge in 1917. He fixes the date on the thirteenth day of the month, the day following a sale which his uncle, Matt Foster, had. (Tr. 204.) That was a place almost at the head of Forbes Bend. (Dyer indicates on

Complainant's Exhibit 56 the location of the mouth of Mill creek with the symbols "M. C. 197.") The ice gorge was there when he got down there. (Tr. 205.) They were in a boat and ran across the ice gorge and couldn't get any farther down. When an ice gorge forms in a river the river raises pretty rapidly. There were some chutes on the Kansas side. They were not big, Dyer was able to get through them with a boat and got behind the ice gorge. When they came back up through a chute there was an awful lot of the current and they could hardly make it, and the river got to cutting that chute out deeper and deeper. (Tr. 206.) The ice jam was high enough to stop the water falling. There were three or four little different chutes going down through there after the ice gorge raised the river. (Tr. 207.) The chute where he rowed the boat was fifty to three hundred feet wide in different places. It did not widen any the day Dyer was there. (Tr. 208.) That was the same year the river had changed its course some, running more from the north to the south and the channel cut through just about where the river is now. This one particular channel was getting pretty deep at that time. There was quite a bit of current going down through it. (Tr. 209.) It was mostly in one place. (Tr. 212.)

In 1917 the biggest part of the river was on the Missouri side. After 1917 there was just about as much water come down the Kansas side as there was on the Missouri side. There were two channels out there. (Tr. 213.) There was another little ice gorge in 1920 that stopped the river up and put the water over on the Kansas side. The ice gorge in 1920 was just about the same place it was in 1917. It was a low and narrow place and full of tree-tops and that is the reason the ice stood in there. (Tr. 214.) After 1920 the flow of the water went to the Kansas side and the Missouri side gradually filled up. (Tr. 216.) (Tr. 219.) Up until 1917 there wasn't any water on the Kansas side. In 1917 an ice gorge formed and cut out a chute. (Tr. 223.) It was about the fourteenth of February, 1917, when Dyer saw the ice gorge. It did not fill in the Missouri channel at that time, but it cut another channel on the Kansas side. (Tr. 224.) The Kansas chute gradually cut out deeper all the time and got bigger, and is about where the main channel of the river now is. (Tr. 228.) Dyer saw three ice jams, one in 1917, one about 1920, and one in 1927 or 1928. (Tr. 230.)

(Tr. 238.) CLARA DYER saw one ice jam on the Missouri river, but cannot state what year it was. It

was before the government did the work on the river in 1934. It was several years before that. The ice jam changed the course of the river and it came back to the Kansas side.

(Tr. 491.) CHARLES BASKINS testified (Tr. 492) that he lived at Lafayette after he was married in 1898. (Tr. 495.) The river moved real close to a couple of miles right across from Lafayette toward the Baker schoolhouse. Dirt, on the Kansas bank of the river and willows growed up high. (Tr. 496.) After that a jam come in there in 1917 then it seemed to spread that channel and the channel came back to the Kansas side. He saw an ice jam from Lookout Mountain and from the French place. They are high places. It was high and for a couple of weeks after that ice broke up and come down through here. The ice jam was quite a little ways up from the Dyer house. That was in 1917. The ice jam in 1917 seemed to split the channel and water come this way around against the Cole place. The Kansas channel in 1917 after the divided flow was maybe a quarter of a mile wide (Tr. 503), and the ice jam was about a mile and a half he believes above the Dyer place. Wolf river cut off then, it used to come way out around down the bend until this land was cut off.

(Tr. 519.) JOHN E. SIMPSON testified (Tr. 521) he saw an ice jam in 1917. It was up the river from the Dyer property and pretty near straight north, a little bit northeast of Lookout Mountain. It dammed up the flow of the river enough to put the water through next to the Dyer place, down through that side. The water did not flow next to the Dyer place before the ice jam. After the ice jam the flow was divided, part of it was going down on the south of this island, by cutting through there. (Tr. 524.) He saw an ice jam in 1917 northeast of Lookout Mountain. It was on the main channel of the river right northwest of this bar land built in there. (Tr. 525.) It backed the river up, then come down across the island there between the ice and the Dyer property. (Tr. 526.) It come in south of the ice jam. When he went back in a week or ten days the water was running around the Missouri channel and on the south too. The water was still flowing where the ice jam was, but there was two channels in place of one, the water kept on flowing around the Missouri side. (Tr. 528.) That ice jam extended across the Missouri part of the river. (Tr. 529.) It backed up the stream and it backed high enough to come down over this other low place down by the Dyer place where the river is now. He went back in a week

or ten days and the ice had gone and the water was divided, part of it going down one side and part down the other. That ice jam was the latter part of February or the forepart of March.

(Tr. 530.) ORON McKAY testified that he was acquainted with the river around Lafayette from 1915 up to 1920. (Tr. 531.) (Tr. 533.) In 1915 and 1916 the river had one channel and after 1917 it had two. The new channel was about a half a mile from the bluff on the Kansas side. It wouldn't be a quarter out to the channel from the mainland. (Tr. 534.) The flow of the river separated in the spring of 1917 and the water flowed on both sides.

Ice Jams of 1928 and 1929

(Tr. 225.) PARDEE DYER testified there was an ice gorge in 1927 or 1928, somewheres along in there, at just about the same place (as the 1917 ice jam). It throwed more current over. In 1927 water was flowing on the east side. (Tr. 226.) Dyer does not know what month or day the 1927 ice gorge occurred. (Tr. 228.) Dyer said three ice jams, one in 1917, one about 1920, and one in 1927 or 1928.

(Tr. 409.) JOHN COUFAL testified that he lived

on the Lafayette farm in 1936. (Tr. 420.) He lived on the Cole place in 1929. (Tr. 421.) On March 8 the river broke up that year, and it was awful heavy ice, it jammed up on the west, northeast end of this island. It forced most of it back to Kansas. The ice jam occurred on March 8 (Tr. 422), that was his daughter's birthday. At that time Coufal was living on the bar waiting for the ice to break up to get back home. There was a cabin out on the bar. The ice jam threw ice on both sides of the bank as high as the bank was and piled it high on the head end of the bar, this disputed land throwed it up and, looked possibly thirty to forty feet high. He was down below it about a mile. He got up in a tree and looked up there and could see the ice was jammed up. It changed the flow of the ice to the Kansas side, that threw it over. Up at the Dyer property, right across from there, is where the ice formed. (Tr. 423.) He walked to the island and the ice jammed up there. There was a channel between the high Kansas bluff and the island. There was no water there at that time. It was connected to the bar. There was a slough there. (Tr. 424.) He hurried back and walked over to the Kansas shore. It was in the afternoon. He went back over in the afternoon and took the boat. Cole came and got him. The water was so swift

it seemed like it was going like a bullet over there. (Tr. 425.) The bar was still Kansas land. The flow of the river changed definitely over to the Kansas side that day after he saw the ice jam. The channel on the Kansas side that day came about a mile from the Dyer house and about a mile from the Cole house and about three quarters of a mile from the Ryan house. The new channel got to be quite big. When he went over it was a small channel, but when he came back it was a big stream. The river had broke up and was bankfull. It was two weeks from the time he went there and when he came back. When he came back the river was a quarter of a mile wide. It kept working on over (Tr. 426) to the Kansas side, cutting in the trees on the Cole place and the Ryan place. There was a channel on the Missouri side after 1929. He fished over there in a boat and could go all through there. (Tr. 427.) In 1929 the water passed the Cole place, was about a quarter of a mile wide after the ice broke up. (Tr. 428.) Before the ice broke up it was an eighth of a mile wide. He took a boat from the Cole place to the sand bar. He took a boat across the Kansas channel to the island. The ice jam was on the west end of the island where he had his cabin and barn and horses. (Tr.

430.) He indicates with "X" on Complainant's Exhibit 48 his location when he was living on the Cole property. He actually saw the ice jam on the head end of the bar. (He indicates with letters "I. J." on Complainant's Exhibit 48 the location of the ice jam.) The ice was piled up twenty-five or thirty feet high. He got up in a tree and saw it. He was scared to go out there. He was afraid the ice was going to get over there. (Tr. 431.) It stopped the flow of the river for a little while, about twenty minutes. The river wasn't flowing as hard as it would have flowed because the ice busted on it one time. The ice was exceptionally thick that winter. About eighteen to twenty-four inches of ice, and it didn't give like it does other years. Just a piece at a time. It melted around the edges and rose up and after the river kept raising higher it finally gave all at once. It just popped. The water backed up a little better than bankfull. (Tr. 432.) After the river went down he went up there and saw the ice piled up. It was piled on the shores and on every little bar. There was ice all over. At that time there was a channel on the Missouri side and a channel on the Kansas side, but not as much on the Kansas side as on the

Missouri side. (Tr. 433.) After the ice jam the water still ran on the Missouri side.

(Tr. 435.) MRS. JOHN COUFAL lived on the Lafayette farm at the time of the trial and testified that she lived on the Cole farm from January until November in 1929. (Tr. 436.) She remembers when the ice broke up. Her husband lived on the bar of the island and they had to cross the big river in a boat and when the river was up there was a little slough that they crossed in a boat, but that was only when the river was high. They had to cross the main river to get over to the island. There was a channel on the Missouri side. Her husband lived on the island part of the time. She remembers seeing an ice jam that year. She heard it when it broke, she saw it. (Tr. 437.) She believes it was on the seventh day of March that it broke up. Her daughter had a birthday the next day. She couldn't tell exactly where the ice jam was, but she remembers it breaking, and the water backing up. They had a little cabin on the main side of the river and the water backed up to the cabins. She believes the ice jam was right down across by Dyer's. When the ice broke up the ice piled around thirty feet high because it was plenty high. She doesn't know a whole lot about the

change in the flow of the water after that, she didn't pay a lot of attention to the river after the ice broke down. (Tr. 438.) She did not live on the island until after school was out, but did go over there on weekends. She was living on the mainland at the time of the ice jam. The ice jam was in the Kansas branch of the river. She was hanging out clothes at the time it broke up. She heard it break and the roar and then the water flooded back up on them not far from the cabins. There was lots of water. They had to cross the main part of the river to get over to the island. (Tr. 439.) There was water on the Kansas side of the stream. They had to cross the main river first to get over to the island. She actually went out and saw the ice gorge. Her husband was over there and after it broke up he stood on the island and called over to her. She would put on his boots and wade water to talk to him. She and her husband saw the same ice george except he saw more of it because he crawled up a tree.

(Tr. 440.) EARL A. COLE was recalled to the witness stand and testified that he saw an ice jam on the Missouri river in the vicinity of Forbes Bend. It was the same one that Coufal talked about. It was in March of 1929. (Tr. 441.) It was out from the Dyer farm in

the Missouri branch of the river. The river up there was very wide and shallow with lots of sand bars. The deep part of the river was right over against the north bank. A large chute came down in front of the Cole place where Coufal was, but it was not very deep and was shallow and wide. The ice jammed about a mile north of the Dyer place. It was kind of hard to tell how high the ice jam was. It was high enough so he could see it plainly. Cakes of ice came out on his alfalfa field and were there for a month. The ice was about fourteen inches thick and pretty large chunks. The ice jam probably was fifteen or twenty feet high. It backed the river up rapidly and raised it up so it came up over the banks. They were worried about getting Coufal home. (Tr. 442.) Immediately following the ice jam the river cut out very rapidly. They could hardly cross the river on his side because the current was so swift. The river cut out in the old chute where it had been coming through. That was the biggest ice jam he can remember. (Tr. 443.) The ice gorge lasted until the water got piled up high with enough pressure to force a hole through it. He knows the river came through awful fast on his side. Cole locates the position of the ice jam on Complainant's

Exhibit 48. (Tr. 444.) By 1929 the Kansas channel was probably 400 feet to 500 feet wide. After the ice jam the water kept running on the Missouri side for three or four years. After the ice jam they had the main Missouri river on the Kansas side. The river on the Missouri side was the main river before the ice jam. (Tr. 445.) By reason of that ice jam the channel shifted from the Missouri side to the Kansas side. The main channel was on the Kansas side from thence out. Before that the Missouri channel was pretty wide, that was one reason for the ice jam, the channel was awful wide and had a lot of low sand bars in it, and that is why the ice piled up first.

(Tr. 654.) GEORGE LARSON, Sheriff of Doniphan County, Kansas, testified that he used to hunt ducks around the Dyer land, (Tr. 655) that was in 1926, 1927, and 1928. There was a bar out there. (Tr. 656.) There was a chute flowing through there in high times. It was pretty wide when the river was up. When it was low you couldn't go through with a motor boat, you had to row. The greatest volume of water was on the Missouri side. There were willows and young cottonwood trees on the bar. Cole was farming a bar with a barn and house on it. (Tr. 657.) There was a tractor

over there and cultivators and plows. Some of the willows and cottonwoods were six inches through. (Tr. 658.) He was back there about 1930 or 1931. He went across the bar. At that time the main flow of the river was right (Tr. 659) along Cole's place. In 1926 and 1927 the river was on the other side.

(Tr. 672.) CLIFFORD COUFAL, age twenty-one, now living on the Lafayette farm, testified he is a son of John Coufal. He lived on the Cole land, (Tr. 673) in 1929. He was nine years old at that time. There was a chute then between what is called the island over there and on the Missouri side was a pretty good sized river. The Missouri channel was the biggest end of the channel. On the Kansas side it was just a small chute. He went over to the island in a boat. There was some current on the Kansas side, that was in 1929. (Tr. 674.) He saw an ice jam at the head end of the bar, at the head end of the island where the river forked to Kansas and Missouri. It was opposite the Dyer house, that was in March of 1929. The ice jam was fifteen or twenty feet high. He saw it from the hill behind the Cole barn. He went up that hill every morning. The ice jam lasted a week or so. When it broke loose it cut over to Kansas and piled (Tr. 675) ice all over it

and caused the channel to move. The Kansas channel cut out pretty fast after that and cut all summer. Big cottonwood trees were going in every day. He lived there that fall. Better than half of the Missouri side moved over there in 1929. The Kansas channel got two or three times wider. (Tr. 678.) After the ice jam broke, it pushed most of the ice down the channel next to the Cole place. Then, after that the river started cutting in there awful hard. After it broke the ice kept coming down for several days from above there. The ice kept breaking on up the river. The ice went on the Missouri side and the Kansas side. There was an island in there at that time. (Tr. 679.) Before the ice jam there was four or five feet of water in the Kansas chute. They took machinery over to the island across the ice in the winter time.

(Tr. 679.) A. F. HAYS, a resident of Wathena, Kansas, (Tr. 680) a farmer, forty-six years of age, testified that he had lived in Doniphan County, Kansas, all his life. There was an ice jam there. He saw it. It was on both chutes. It completely dammed both chutes. (Tr. 689.) He saw the ice jam on the Missouri side. The water there was so wide and so shallow with all the bars in it, that is what caused it to block. Afterwards the

nnel on the Kansas side was wider and deeper. It was low on both sides before the ice jam. The ice jam right out from Pardee Dyer's. (Tr. 690.) The ice on the Kansas side was right at the head of the chute. cannot recall the exact year, but says it was after 1920, would say between 1920 and 1926, as near as he ld tell. (Tr. 691.) He saw the ice jam a couple of s in February or the first of March, he wouldn't state. ter ran around the Missouri branch about four years r that. He did not see the ice jam break up. It was ut five or six feet above the bars. Those were all bars.

Maps and Documentary Evidence

Numerous maps, plats and exhibits containing documtary evidence are in the record, many of which do concern the dispute in the Forbes Bend area.

he complainant has already, herein, pointed out the testimony showing the erosion of land on the left k, or Missouri side of the river. This testimony is ported by the various exhibits introduced during the ring before the Master.

he exhibits bearing a date prior to 1898 are of no conrable help in determining this controversy, except to e that no marked erosion is shown thereon and show-

ing the North Half of Section 1 and the Northeast Corner of Section 2 in Township 59, Range 38 and the whole of Sections 25, 26, 36 and the major portions of Section 27 and 35 and fractional portions of Sections 28 and 34 in Township 59, Range 38, all in Holt County, Missouri, to be intact. See Respondent's Exhibits 25 and 26.

The first perceptible movement of the river is reflected by complainant's Exhibits 50 and 51, the same being photostatic copies of an Atlas of Holt County, Missouri under date of 1898, wherein slight inroads are shown into the territory mentioned in the paragraph next above.

There is a lack of documentary evidence between 1898 and 1918.

The next exhibits, showing the movement of the river, are Complainant's Exhibits 52 and 53. These exhibits are photostatic copies of a Holt County Atlas under date of 1918. These exhibits reflect that, at the date thereof, all of Section 28, the major portion of Section 27, the southerly half of Section 26, and the southwesterly corner of Section 25, the westerly quarter of Section 36, all of Sections 34 and 35 in Township 59 North, Range 38 West, fractional portions of Sections 1 and 2 in Township 58 North, Range 38 West, in Holt County, Missouri, had been consumed.

Complainant's Exhibit 46 is a composition of Sheet 13 and 14 of a series of maps of the Missouri River; compiled by the War Department, Corps of Engineers of the United States Army; from Kansas City to Sioux City under date of July, 1923, and relates specifically to the territory in controversy (Tp. 91 and 112). This exhibit reveals definite information as to bank lines on both sides, the division of the flow at that date, the Section lines on the Missouri side; the outline of the island showing the location of tree, the area under cultivation, the location of improvements, together with soundings on each side of the island. Witness Geiger, associate engineer of the United States Engineering Department (War Department) (Tp. 111), testified concerning the middle of the channel from Complainant's Exhibit 46, as of July, 1923, as follows:

> "THE SPECIAL MASTER: How, then, are we to ascertain where the mid-channel was?
>
> A. Continuous greater depth should be followed.
>
> THE SPECIAL MASTER: Well, suppose we don't have that? Suppose we reach a point where you don't have continuous greatest depth?
>
> A. I don't think we would reach the point, your Honor, because it must be continuous, I mean continuous main depths of that vicinity. Some places we might have 38.

THE SPECIAL MASTER: Is that your key to the midchannel?

A. Yes, sir.

THE SPECIAL MASTER: Give me the mid-channel right here (indicating). Where is it; where is the mid-channel?

A. We would have to study above and below, your Honor, most likely 13 in this range.

THE SPECIAL MASTER: Is that feet?

A. Yes, sir, 13 feet.

THE SPECIAL MASTER: And where, then, does it continue? Does it continue on the west or north or south side of this low island here?

A. It is indicated by these soundings that it *continues on the Missouri side in this case, or on the left bank.*" (Tp. 123.)

The Court's attention is called to the information placed upon Exhibit 46 by the U. S. Engineers' Office. In that respect the witness Geiger testified:

"Q. Now, there are certain other designations, Mr. Geiger, such as cultivated, willow and timbers willow, cottonwoods, cutting, caving. I will ask you where that information came from.

A. That information was obtained by the field parties directly from the source, that is in the field.

Q. Upon actual view?

A. Yes, sir."

The Court's further attention is called to the fact that at the date of this exhibit all activity, such as cutting

and caving of the bank, is on the left or Missouri side of the river. The exhibit does not indicate there was any cutting or activity on the part of the river on the right or Kansas side at that time. This exhibit also indicates that the river in this territory had cut to a place somewhere near the north and south center line of Section 36 and had consumed practically all of Sections 26, 27 and a major portion of Section 25 and that the cutting was extending into Sections 22 and 23 all in Township 59 North, Range 38 West in Holt County, Missouri.

Exhibit 46, conclusively refutes the allegation of Respondent's answer, wherein it is denied that the Missouri River had a divided flow during the period from 1918 to 1927.

Special Master's Exhibit A, being a topographical map or the Oregon quadrangle surveyed in 1924, is in substantial accordance with the information reflected upon Complainant's Exhibit 46, the Special Master's Exhibit showing that there was a divided flow in that area at the date of the survey, and also shows the approximate left bank of the river at that time. While Exhibit A of the Special Master, may indicate a larger volume of water on the Kansas side of the river at its date, we definitely feel that Complainant's Exhibit 46 is most conclusive

upon this point, for the reason that actual information is given in detail as to the depth of the channel in that area and by scale the width of the flow on each side of the island is established.

Complainant's Exhibit 47 is Sheet Number 40 from a series of maps of the Missouri River from Kansas City to Sioux City, made by the Corps of Engineers of the United States Army, under date of November 9th, 1926, and relates specifically to an area presently in controversy. This exhibit shows that at the date thereof it had consumed land in Holt County, Missouri a considerable distance to that reflected by the previous exhibits. The Witness Geiger testified:

> "Q. What is the distance between what you have previously designated as the left bank of the river and the C. B. & Q. R. R.?
>
> A. Not having a scale, if you want to break it down, I would prefer we had some way to measure that. (A ruler was handed to the witness.) That scales 1,800 feet to the bluff from the high bank.
>
> Q. Now, to the railroad?
>
> A. From the railroad, it scales approximately 1,500 feet from the C. B. & Q. R. R. to the high bank at this point." (Tp. 142-143.)

The same witness further interpreting Exhibit 47 with particular reference to principal flow of the river in this area testified:

"Q. At this time will you state where the principal flow of the Missouri River was in the Forbes' Bend area as shown by this map of 1926?

A. The principal flow and the greatest width is within 2500 feet of C. B. & Q. R. R., center of the greatest width.

Q. In Holt County, Missouri?

A. Yes, sir.

Q. How does that compare with the flow on the right bank or right side of the Missouri River?

A. It appears some four times greater on the left bank than it does on the right side, right up against the right bank."

An examination of Complainant's Exhibit 47 shows a divided flow on the date thereof, with but a chute on the right or Kansas side (Tp. 144), and that the area to the right of the principal flow was of sufficient height and identity to support vegetation, the location of which is indicated upon the exhibit.

Witness Geiger of the Engineers office testified further concerning the movement and location of the Missouri River with reference to its distance from the C. B. & Q. R. R. as reflected by Complainant's Exhibit 48, under date of September 17, 1930, as follows:

"Q. While we have this in mind, Mr. Geiger, I will ask you to give us that same information from the C. B. & Q. tracks in Holt County, Mis-

souri to the left, what you have described as the left bank line on Exhibit 48, as of September 17, 1930.

A. C. B. & Q. R. R. to be fair about this thing let's determine the angle from which we measured. At approximately the same measurement of vicinity as stated before C. B. & Q. R. R. to the high bank scales 1100 feet.

Q. I will ask you on Exhibit 48, which is of 1930 to give us the measurement at the closest point from the left bank line to the C. B. & Q. R. R.

A. The closest point from the C. B. & Q. R. R. to the left bank will be approximately 550 feet."

By comparison of Exhibits 47 and 48 together with the testimony of the expert witness it is conclusively shown that the left bank of the river at the point in controversy moved a distance of 400 feet to the North and East between November, 1926 the date of Exhibit 47 and September, 1930 the date of Exhibit 48.

The allegation contained in the answer of the Respondent that the Missouri river in this area did not have a divided flow between 1918 and 1928, is again refuted by Complainant's Exhibit 102 (Tp. 978), definitely showing a division of the flow. Complainant's Exhibit 102 is Sheet Number 40 of a series of maps of the Missouri river from Kansas City to Sioux City, under date of November 23, 1928, and compiled by Corps of

Engineers of the United States Army. This exhibit reflects a very definite division of the flow in this area and unquestionably shows the principal flow to be upon the left or Missouri side of the river. A comparison of this exhibit with Complainant's Exhibit 46, bearing date of July, 1923, definitely establishes that there was a continuation of erosion in the north and easterly portion of the disputed area, for, as the Court will see, by such comparison, that the cutting continued closer to the railroad tracks on the Missouri side and extended definitely eastward. This particularly is true at the place where the words "Forbes Bend" appears on Exhibit 102 and from there down stream to the end of the Forbes Bend dispute.

Your attention is directed to the fact that on Complainant's Exhibit 102 areas are shown on the disputed land as being in cultivation. Other areas are shown to support willows and still others to support timber and willows. All this is in line with the oral testimony of the witnesses discussed elsewhere in this brief.

The next exhibit reflecting information and evidence as to the condition of the river in the Forbes Bend area is Complainant's Exhibit 48, being Sheet Number 41 of a series of surveys made by the Corps of Engineers

of the United States Army under date of September 17, 1930, and shows the left or Missouri channel of the river had practically closed and there remained but a small flow of water around the North and East part thereof. The oral testimony indicates that the flow of water remaining in the old channel was from Mill Creek drain entering from the Missouri side and which is shown on this exhibit. This exhibit is in conformity with the oral proof of the Complainant that an ice jam occurred in the left channel of the river in the vicinity of the entrance of Mill Creek drain during the winter of 1928-1929 causing the water of the river to be forced upstream and into the Kansas or right channel of the river and thereafter water in any appreciable quantity ceased to flow in the left or Missouri channel.

The fact that water ceased to flow in any volume in the left or Missouri channel is supported by complainant's Exhibit 134, which is a mosaic of aerial photographs, compiled from prints secured from the office of Army Engineers in Kansas City. The photographs were taken in 1930 (Tp. p. 1430).

Complainant's Exhibit 49 is Sheet Number 41 of a series of maps of the river from Kansas City to Rulo, Nebraska, compiled by the Corps of Engineers of the

United States Army under date of May 8, 1936, showing the river proper, (Tp. 148) reflects that at the date thereof the left or Missouri channel shown on Complainant's Exhibits 46 and 47 had completely closed and that at the point where the left channel separated from the Kansas channel the Corps of Engineers caused to be erected revetments and pilings (Tp. 151), causing the principal flow of the Missouri River to remain on the Kansas side. The area to the left of the principal flow and formerly a part of the abandoned river bed is supporting willows and vegetation and not water. In this respect the witness from the Corps of Engineers testified (Tp. 150):

> "Q. Across the face of the map in the Forbes' Bend area appears a rather large white space without dots or any other indication thereon. Could you tell from an examination of this Exhibit 49 what, if anything, is occupying that area?
>
> A. Yes, there is a growth of some sort. We would say willows, but it is not shown as willows on this map.
>
> Q. At that time was any portion of that area covered by water, or could you tell?
>
> A. No portion of that area covered by water within the bounds of this willow, timber legend, vegetation legend, no water within those bounds."

There was no testimony in the record that the area,

lying between the present course or channel of the Missouri River and that of the maximum erosion line on the left high bank of the river, ever lost its identity.

The Special Master in his report, at page 54, makes the following statement:

> "What may have happened between 1924 and 1941 with respect to the flow of the stream, the filling up or drying up of what is called 'the Missouri channel', and the restoration of the firm land on the east or Missouri side of the river to the condition it was before the river started out on its foray, is of consequence only as showing or tending to show that the process by which the river expanded between 1906 and 1924 was virtually duplicated as it contracted and receded to its original location between 1924 and 1941."

The Special Master further makes a finding number 9, shown at page 93 of his report, as follows:

> "9. That the same or virtually the same natural forces which progressively diverted the flow of the river toward the North and East in Forbes Bend until the cut bank on the Missouri side and along the left bank of the farther branch or the divided channel had by gradual erosion reached within a short distance of the Burlington Railroad tracks, operated in a like manner to turn the main volume of water back into its accustomed channel to the South and West in the vicinity of the higher grounds of Kansas."

This statement and finding seem impossible in view of the conclusive evidence contained in the authoritative exhibits produced by the Complainant from the Corps of Engineers of the United States Army in Exhibit 46 under date of 1923 showing the left or Missouri channel to carry the principal flow with the cutting and caving continuing on the left or Missouri side and followed by Exhibit 47, under date of November, 1926, showing further and definite encroachment on the left or Missouri side of the river and, as previously pointed out herein, the left or Missouri channel to be four times greater than the Kansas chute (Tp. 144), and then followed by Complainant's Exhibit 102, under date of November, 1928 wherein a very definite division of the flow of the river is shown and unquestionably shows the principal flow of water to be upon the left or Missouri side and also shows further consumption of land on the left or Missouri side. Then followed by Complainant's Exhibit 48, compiled by the same authority; but one year and ten months later, September, 1930, showing that the left or Missouri channel had practically closed and there remained but a very small flow of water in the abandoned channel; leaves the quoted statement and finding of the Special Master without basis in fact, especially where the Complainant has

amply supplied proof of an ice jam in the intervening period of time, between the dates of the two exhibits last mentioned. The testimony concerning such ice jam is abstracted and discussed elsewhere herein.

Complainant's Exhibit 30, being sheet Number 38 of a series of maps of the Missouri river from its mouth to Rulo, Nebraska, under date of October, 1939, and furnished by the Corps of Engineers of the United States Army, shows the nature and extent of river improvement work done by that department of the United States Government in the Forbes Bend area. The Court's attention is directed to the fact that the river in that area is so confined at this time that the exhibit does not treat of the former location of the Missouri river as demonstrated in the exhibits previously discussed herein.

Complainant's Exhibit 138 is a mosaic compiled from airplane photographs of the Missouri river in the Forbes Bend area and was secured from the Office of the United States Engineers in Kansas City, Missouri. This is the current map from that Governmental Department showing the present flow of the river in the Forbes Bend area.

Complainant's Exhibit 55 is a plat made in the month of March, 1931, by John H. Peret, who was at that time County Surveyor of Holt County, Missouri. This plat

shows the location of the Missouri river, after the left or Missouri channel had completely closed, that is to say, at that time, water was not passing through the area as a regular channel and that only surface waters or water from Mill Creek drainage ditch constituted the only flow in the area. The Court will note that there is designated on this plat, what is described as the left erosion bank of the Missouri river. Thereafter, Holt County, Missouri, proceeded to sell the lands within this area as school lands to various parties. A description of the various patents issued by Holt County, Missouri, are contained in the record. The Court's attention is directed to the fact that Holt County, Missouri, subsequent to the year of 1931, or the closing of the channel of the Missouri river adjacent to the left bank, did not treat this land as accretions but attempted to create an entirely new and independent title without regard to rights, if any, of the adjoining landowners in the State of Missouri. The Court's attention is further directed to the fact that the school land patents issued by Holt County, Missouri, contain descriptions referring throughout to the left erosion bank of the Missouri river. By reference to these patents the maximum erosion line on the left bank of the river can be established with certainty. Mr. John H. Peret, the

author of this plat, testified in this case, his testimony beginning at page 358 of the transcript and continuing through to page 377. The Court's attention is further directed to the fact that Mr. Peret, at the time of making this survey, caused to be imposed upon the plat an area which the author has marked "squatter, name unknown" and also shows the outline of what apparently was under cultivation or improvement. The direction and extent of fence lines are shown. This is in conformity to the oral testimony offered by certain witnesses of the Complainant, wherein they testified that they had improved and cultivated this land under the direction of Mr. E. A. Cole, one of the adjoining Kansas landowners. That testimony is abstracted and treated elsewhere in this brief.

Mr. Peret, while testifying concerning Complainant's Exhibit 55, told of the manner in which he located the left erosion bank and the method used in surveying such bank. (Trans. 360, 361.) Mr. Peret testified that a continuous description could be compiled from the different surveys and patents. (Trans. 365.) Mr. Peret further testified that the survey began in January of 1930, and two-thirds or three-fourths of the work was done from January to May of 1930. (Trans. 366.) Therefore, of necessity, the left or Missouri channel of the Missouri river would have

been closed at this time. The witness further testified that he taught school at a site located in the disputed area. That he was familiar with the particular territory from 1906 to the date of his appearance.

> "Q. During the time since 1906 you have had occasion to watch the movement of the river and particularly as engineer of the county, have you?
> A. Yes.
>
> Q. From 1906 until 1917 just state to the court what the Missouri River did in this vicinity of what is known as Forbes' Bend, as you recollect it?
> A. Well, there was cutting back nearly every year. I don't know that it cut back every year, but nearly every year until it cut back to the line I show as erosion bank line.
>
> Q. About what year did Baker School House go into the river, or did the location go into the river?
> A. I think it was 1911 or 1912." (Trans. 370, 371.)

Complainant's Exhibit 58 is a plat of the lands on each side of the Missouri river compiled by H. L. Parker, civil engineer, showing various information secured from various sources. This exhibit shows the left bank of the Missouri river in 1918; shows the Government survey of 1923, evidently taken from Complainant's Exhibit 46, describing the cutting left bank of the river at that time; shows the left erosion bank line as taken from the survey

of witness Peret; also shows the Kansas Territorial Survey line of the right bank of the river in 1855; also shows the left bank of the Missouri river in 1898, and various other information.

The Court's attention is directed to the fact that the width of the Missouri river, as shown on this exhibit, is not accurate, and the plat was offered without regard to the width of the river but for the purpose of correlating the location of the sections, townships and range on the Kansas side and the sections, townships and range on the Missouri side together with other various information thereon reflected.

Again returning to Complainant's Exhibit 46, compiled by the Corps of Engineers of the United States Army under date of July, 1923, an examination thereof will disclose a large island around which is shown to be a considerable volume of water. The Commissioner in his interpretation of this exhibit has erroneously concluded that such island as shown thereon was in existence in 1890. In this connection your attention is called to the statement of the Commissioner beginning at the bottom of page 33 of his report wherein he discusses the testimony of Howell E. Geiger of the Corps of Engineers office:

"Says there is superimposed in this map the 1890 river bank lines, the 1890 river mileage, 'and also an island.' This 'island' of 1890 is again mentioned by this witness." (Tr. I, 118, 119, 126.)

To understand fully the testimony of witness Geiger in this respect we are setting forth his complete statement wherein he changed the existence of the island from the year 1890 to the year 1923, the date of such exhibit:

"Q. Mr. Geiger, I will ask you to tell the Court what is indicated by this dotted line in the center there (indicating).

A. That indicates an island and refers to 1890. In other words, that came off of your 1890 map and was superimposed.

Q. Not that I want to quarrel with you at all, but—

A. (Interrupting). No.

Q. (Continuing)—here are your soundings on either side.

A. Let me correct that, because I am wrong on that last. That is the shore line of this date.

MR. HAYES: 1923?

A. 1923, yes, sir, soundings come up to it in all cases and stop.

Q. (By Mr. Schroeder.) Then in the center of the enclosure, a point marked 'small house,' in another area marked 'cultivation,' that existed at the time of the making of this map?

A. Yes, sir.

Q. In the compilation of this map?
A. That is true.

Q. And the date of the compilation of this map, a divided flow was indicated in the Missouri River at that point?
A. Yes, sir."

The fact is that the island to which the Master has reference is located entirely to the left of the left bank of the Missouri River as it existed in the year 1890, as shown by this exhibit and testified to by the witness. As a matter of fact the island to which the Master had reference was a part of the firm high bank and forming a part of Section 27 in Township 59 North, Range 38 West in Holt County, Missouri. Very obviously the reference to this island could not have been within the confines of the bank lines of the Missouri River as they existed in 1890.

The various documents and exhibits introduced in behalf of the Complainant and by admission of the Respondent and as found by the Master in his report, show that there was a gradual eating away on the left bank of the river gradually extending the left shore line to the North and East until the close of the left channel of the Missouri River to a continuous flow sometime prior to the date of Complainant's Exhibit 48 under date of September, 1930, and subsequent to the date of Complain-

ant's Exhibit 102 under date of November, 1928. There can be no doubt as to the suddenness with which the left or Missouri channel of the river closed. We have previously pointed out herein that within a period of one year and ten months the river made a complete change of its location, and the principal flow of water and main channel thereof moved to the South and West a considerable distance in this short period of time.

There has been some intimation on the part of scattered witnesses of the Respondent that the closing of the left or Missouri channel of the river was caused by silt deposited therein from Mill Creek drain. This evidence is not convincing. The argument is illogical and should not be given weight for as a matter of fact the small volume of water and silt from this drainage ditch could not possibly have any effect upon a river the size and extent of the Missouri. A witness, Alan Staver, of the office of the Corps of Engineers of the United States Army, so testified.

We wish to direct the Court's attention to the fact that Holt County, Missouri, the governmental agency of the Respondent having jurisdiction over such matters, did not treat the land within the disputed area as accretions but dealt with such as new lands, issuing new

patents to new owners different from those whose land had been lost by the gradual cutting and erosion of the Missouri River and to owners different from those adjoining on the left erosion bank, as shown by Complainant's Exhibit 55. The action of Holt County, Missouri coincides in time with the testimony of the Complainant concerning the ice jam of 1928 which affected the closing of the left or Missouri channel of the river, and as witness Peret testified, he, with the County Court of Holt County, Missouri, viewed this land in May or June of 1929 (Tr. 372, 373), and after the completion of the Peret survey, Complainant's Exhibit 55, this land was ordered sold by the County Court of Holt County, Missouri as school land, and in pursuance of such order school land patents therefor were issued to various purchasers throughout which course of dealing the agencies of the State of Missouri treated the area as new land and not as accretions.

The documentary evidence clearly shows the slow and gradual erosion of the Missouri River into the left bank over a long period of time and, as testified to by the expert witnesses, there must be accretions built to the right bank of the river and alluvial deposits made upon the opposite shore. This is supported by the testimony of Witness Staver of the U. S. Engineers office.

At all times up to the time of the ice jam of 1928 the principal flow of the Missouri River was on the left or Missouri side, and after the ice jam of 1928 the main channel suddenly changed over and pursued a course on the Southerly or Kansas side.

When the Master's Report is supplemented by the above quoted portions of the transcript, to which he made no reference, and the documentary evidence is examined and analyzed the picture is entirely altered from that drawn by the Master in his Report.

The whole picture shows that in 1890 the channel of the river did not strike the Kansas bluff until it had gone beyond the foot of Lookout Mountain, with a considerable tract of low land upon the right bank of the mouth of Wolf Creek. The river, however, ate into the Kansas bank until it had cut out the mouth of Wolf Creek and struck the adamantine rock at the north of Lookout Mountain. When this happened, the channel was sharply diverted to the left. In doing this, the river had gone to the right and the large island and low land to the north of Lookout Mountain to the right of the channel was eaten away. In the process the corresponding accretion on the left bank above Lookout Mountain took place so that hundred of acres of land were

thereby transferred from Kansas to Missouri by the process of erosion and accretion. This is all upstream from the disputed area.

When the channel struck the adamantine rock at the foot of Lookout Mountain, the river could no longer eat into the Kansas side and turned sharply to the left. The process of erosion on the Missouri bank then began and was carried on for over twenty years during which time the channel steadily moved, year by year, to the north and east, going over three miles from Lafayette to a point near the tracks of the Burlington Railway.

This process of erosion is described by many of the witnesses and corresponds very remarkably with the description of erosion and accretion in the Missouri River described by Justice Brewer in *State v. Iowa*, quoted by the Master in his Report at pages 26 and 27. This erosion did cut into the bank as we have already stated very clearly appears in Complainant's Exhibit 46 and in the Peret Map Complainant's Exhibit 55. Of course, as the current swung to the left and followed the Missouri bank there was a corresponding quiet swirl of the river along the right bank. Soil was deposited along that bank.

The court does not need the testimony of laymen,

who saw this done and testified to the fact, or the testimony of experts, that such accretion would take place. It is a matter of common knowledge that where a river is eating into one bank, there will be a corresponding accretion along the opposite bank. That is what Geiger and Staver said would take place, Cole, who was an engineer and also an interested party, testified to the same effect, and eleven witnesses testified to the fact that they saw this accretion and walked out across it, some half a mile, some of them a mile and a half, and others as far as three miles.

All of this is a complete answer to the Master's findings that the disputed land "emerged" from the center of the stream a full grown island. On the contrary, the evidence clearly shows that after this erosion had extended far to the northeast and the accretion attached to the Kansas bank had become correspondingly extended, the ice jam occurred in 1917, by reason of which the water ran down a chute across the accreted land close to where the 1890 channel was and approximately where the channel is now found. That formed the island, but the main channel continued around to the north and east of the island for some time. The Kansas channel, however, grew, and another large ice jam oc-

curred in 1928 which is vividly described by the witness, which practically completed the transfer of the main channel from the Missouri side to the Kansas side of the disputed land. The Missouri channel gradually dried up, and the whole channel followed its fixed course where it is now flowing and to which it has been well harnessed by the government works.

Thus we have the picture of the river shifting its course by erosion and accretion over a period of more than twenty years and then by cutting across the ox bow, the accreted land, without disturbing its identity, changed its course back to the Kansas bluffs. Under these facts and the law, the disputed land belongs to the complainant. The complainant's citizens farmed the land, the complainant's county officials assessed and taxed the land, and it was in fact in possession of the Kansas owners until seized by the respondent under its swamp land statute and sold to some of its own citizens. It was not restored to the farmers who lost their farms by erosion. Their land was dissolved in the river, and deposited somewhere between Forbes Bend and the Gulf. It was lost to Missouri just as the large tract of land above Lookout Mountain was lost by erosion to the Kansas owners while a corresponding accretion was built up on the left bank

of the river for the benefit of Missouri and the Missouri riparian owners.

We very respectfully submit that the statements of the Master contained on pages 78 and 79 are not justified by the evidence but that erosion and accretion were fully established and that the process by which the channel roving river reached the farthest bank to the north and east were not at all obscure but were well proved. On the contrary, there was no evidence whatever that the river went back to its present channel by any process of erosion or accretion. There is no basis for the Master to say—

> "If it is permissible for Complainant to rely on the firmly settled doctrine of accretion to justify its claim to these bottom lands in Missouri, it would seem equally allowable for Respondent to do the same in vindication of its asserted right to a reclamation of the same land." (M. R. 78, 79.)

This eventuates into Finding No. 9 (page 93), which should be set aside as unsupported by any evidence.

There is absolutely no evidence to support that statement but, on the contrary, the evidence clearly shows that the transfer back to the Kansas side was as above stated, by cutting squarely across the accreted land and

finally fixing its channel through what was originally only a chute.

The Law

The rules of law applicable to this case are recognised by both sides. A statement is sufficient without citation of many decisions of this court. The rule that the boundary between states shifts with the river as it changes its course by erosion and accretion, and that the boundary does not change if the river shifts by avulsion, is thoroughly established. There is a corollary to this rule which has been stated by some of the courts and is recognized by the Master in his report. This is to the effect that the avulsion may not be violent or all at once but may be by a gradual change, provided the new channel leaves undisturbed identifiable ground between the old and the new channel. In such a case the rule of avulsion would apply, or perhaps it would constitute an exception to the rule of erosion and accretion. This doctrine seems to have been approved by this court in *Nebraska v. Iowa*, 143 U. S. 359; 36 L. Ed. 186, wherein Justice Brewer quotes with approval from Vattel as follows:

> "But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs

> into one of the two neighboring states, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river and the river itself is, as it were annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows." (l. c. 189.)

See, also, 45 C. J. 532.

This corollary is supported by the opinion written by Hon. Walter H. Sanborn in the case of *Commissioners v. United States*, 270 Fed. 110, in determining the boundary lying between two states. After stating the general rule of erosion and accretion and of sudden or violent change by avulsion, he said:

> "Counsel rely upon the first clause of this rule. That clause is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the pro-

portion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion, while the water in it remains a running stream. *Davis v. Anderson Tully Lumber Co.*, 252 Fed. 681, 683, 164 C. C. A. 521, 523; Franham on Waters & Water Rights, p. 2500; *Hahn v. Dawson et al.*, 134 Mo. 581, 591, 36 S. W. 233; *City of Victoria v. Schott*, 9 Tex. Civ. App. 332, 29 S. W. 681, 687; *Glassell et al. v. Ross Hansen, et al.*, 135 Cal. 547, 67 Pac. 964; *Indiana v. Kentucky*, 136 U. S. 479, 509, 10 Sup. Ct. 1051, 34 L. Ed. 329; *Missouri v. Kentucky*, 11 Wall. 395, 408, 20 L. Ed. 116; *Washington v. Oregon*, 211 U. S. 127, 135, 29 Sup. Ct. 47, 53 L. Ed. 118. The evidence in this case has convinced that it falls under this exception: The main channel of the river never gradually crept over the intervening space occupied by the island, but from 1872 to the present time it was on either one side or the other of this island. The main channel passed from the south side of the island to the north side by the swinging during many years of the waters of the river from side to side of that stream, by the gradual increase during many years of the proportions of its waters flowing through the north channel and the gradual decrease of the proportion of its waters flowing through the south channel until the north channel was gradually

filled. The island never became an accretion to the lands of the owners of the south bank of the river, and the decree below must be, and it is, affirmed." (l. c. 113, 114).

The learned Justice cites the earlier case of *Davis v. Anderson Tully Co.*, 252 Fed. 681, the opinion in which was also written by him. In that case the Mississippi River flowed around what was known as Walnut Bend. At the time of the original surveys, Whiskey Chute and Bordeau Chute were extended across the peninsula formed by the bend. In high water some of the waters of the river flowed through these chutes, and a portion of the peninsula between the two chutes was called Bordeau Island, while another portion was called Whiskey Island. Some time between 1871 and 1875 the main channel of navigation and the larger volume of the water changed its course from its bed around the bend to Bordeau Chute forming a cutoff, and the river never returned to Walnut Bend although the water flowed and packet boats passed around through that bend for at least ten years thereafter. It subsequently became a lake, and a large part of the river bed as it was when the cutoff took place was filled with sediment and trees grew on parts of it. In that case, after citing the facts, the court said:

"The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural process of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. *Arkansas v. Tenn.*, 246 U. S. 158, 38 Sup. Ct. 304, 62 L. Ed. 638; *Cissna v. State of Tennessee*, 246 U. S. 289, 38 Sup. Ct. 306, 307, 62 L. Ed. 720. But the first clause of this rule was made to govern and is applicable to cases where, by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the channel, and the decrease from year to year of the proportion of its

waters passing through the old channel until finally the new channel became the main channel of navigation. *Missouri v. Kentucky,* 11 Wall. 395, 408, 20 L. Ed. 116; *Washington v. Oregon,* 211 U. S. 127, 135, 29 Sup. Ct. 47, 53 L. Ed. 118.

The evidence in the record in hand upon the question of avulsion *vel non* is conflicting; *but that question is immaterial, because if there was no avulsion this case falls under the exception to the rule of gradual change.* (Our italics.) The strongest evidence in support of gradual change goes only to prove that for several years prior to the cut-off, which was probably in the spring of 1873, larger volumes of water had been flowing through Bordeau Chute year after year, until residents in the vicinity and those familiar with the river expected the change, and until finally the channel through the chute carried deeper water and was more navigable than the channel around the bend, and then the former became the main channel of navigation and the use of the old channel for commercial purposes and the waters in it gradually receded. There were thousands of acres of land between the old channel and the new one. There was no evidence that the river or its channel crept over these lands by the gradual processes of accretion and erosion. The proof was that the waters of the river gradually cut a new channel south of these lands and abandoned the channel northwest of them, and the conclusion is that the boundary between the states remained in the old channel of navigation around the bend as it was at the time that the course through Bordeau Chute became the main channel of navigation, and that

> that boundary now is where that old channel, by the processes of accretion and reliction, had become at the time when the waters flowing through it around the bend became stagnant and ceased to be a running stream." (l. c. 685, 686.)

The above statement of facts in the Davis case can well be paraphrased to fit this case. The evidence establishes the fact that the main channel of the river crept from the Kansas bank over to the left side of the river, cutting into Missouri well nigh to the Burlington tracks. The disputed land in question was at the same time, through those years of erosion, builded up by accretion. The channel and course of navigation went around to the left of this alluvion which did not lose its identity. Afterwards, some time, somehow (we say by reason of the ice jams), the river changed its course. It ran down a chute across the alluvion. Gradually the chute grew and grew until it became the whole river. The old river bed is abandoned. This all happened before the artificial improvements were begun some time after 1933. The shifting of this stream is testified to by many witnesses; it is undisputed and is definitely proved by the Departmental maps: Exhibits 133 and 134, being aerial maps taken one in 1928 and another in 1930, by comparison show very definitely the increase of the new channel and

the fading out of the old channel. Whether the new channel was begun by an avulsion or not is immaterial, because there is no evidence whatever that the channel of the river, which flowed around the bend, came back to the present channel by a process of erosion and accretion, gradually eating away the alluvion and moving itself back by the process of erosion and accretion. There is no claim that such a change took place. There is no evidence to support any such claim if it were made. The undisputed evidence is that it came back, not by a creeping process but by leaping, jumping down the chute, making an island of the alluvion which is now standing just where it was, unharmed and untouched except by the invasion of the new stream across its territory.

See *Davis v. Columbia River*, 50 F. 2d 961, 963; and *Veatch v. White*, 23 F. 2d 69.

The law as announced by Justice Walter H. Sanborn stands unchallenged and is evidently a correct statement.

Another proper corollary to the rule is where the channel is changed in such a manner that land lying between the original channel (in this case the Missouri channel) and the new channel (the present channel) can be identified, such land belongs to the state to which it belonged before such change in the channel. This proposition

seems to be supported by the language used by Justice Brewer, quoting from Vattel as follows:

> "When the violence of the stream separates a considerable part from one piece of land and joins it to another, *but in such manner that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner." *Nebraska v. Iowa,* 36 L. Ed. 189, 143 U. S. 370. (Italics ours.)

Two Missouri cases clearly recognizing that the ownership of land or the boundary of a state does not change unless the identity of the land cut off is lost, are as follows:

> "In determining whether a riparian owner has title to land by accretion, the length of time it was forming is not important. If it was formed by a gradual, imperceptible deposit of the alluvion, it is accretion, and becomes a part of the land against which it is deposited; but IF THE STREAM CHANGES ITS COURSE SUDDENLY AND IN SUCH MANNER AS NOT TO DESTROY THE INTEGRITY OF THE LAND OR SO THAT THE LAND CAN STILL BE IDENTIFIED, it is not accretion and the boundary line remains the same as before the change of the channel." Syl. 2, *McCormick v. Miller,* 239 Mo. 463; (same case, 144 S. W. 101).
>
> "Where a non-navigable stream of water constitutes the dividing line between two tracts of land and the stream changes its course SUDDENLY OR IN SUCH A MANNER AS NOT TO

DESTROY THE IDENTITY OF THE LAND BETWEEN THE TWO CHANNELS OR TO RENDER IT INCAPABLE OF IDENTIFICATION, THE process is not one of accretion and the boundary line remains as it was before the change in the channel of the stream." *Brown v. Wilson,* 36102, Sup. Ct. Mo. in banc, Oct. 25, 1941, Syl. 7, 155 S. W. 2d 176, citing *McCormick v. Miller,* 239 Mo. 463, 144 S. W. 101; *Bratschi v. Loesch,* 330 Mo. 697, 51 S. W. 2d 69; *State, ex inf. Mansur, v. Huffman,* 318 Mo. 991, 2 S. W. 2d 582.

A third corollary to the rule may be stated as follows: When the old channel becomes stagnant, the boundary line becomes fixed as if a monument had been set.

This rule is applicable to the case at bar, as is clearly shown by the Peret maps, Exhibit 55, where the abandoned river bed is shown, and by the War Department maps.

A fourth corollary may be stated as follows: The whole abandoned river bed belongs one-half to Missouri and one-half to Kansas. For example, the Peret map may be used in fixing the boundary line along the thalweg of the abandoned channel, the portion of the river bed to the left thereof belonging to Missouri and the portion to the right thereof belonging to Kansas. This rule is well recognized and is stated in *Arkansas v. Tennessee,*

38 Sup. Ct. 305; *Nebraska v. Iowa*, 143 U. S. 370, 36 L. Ed. 189.

Conclusion

We confidently affirm that upon a fair consideration of the evidence, oral as well as documentary, the following facts are clearly established. About 1900 the Missouri River in Forbes Bend ran close to the Kansas bluffs, but by erosion and accretion the river swung far to the left until it finally reached a point within a few hundred feet of the Burlington tracks. Alluvion at the same time was deposited as an accretion to the Kansas bank so that there was formed a very pronounced bend which took the name of Forbes Bend, with land lying between Stations on the 1890 line of the channel, 510 and 515, as shown on complainant's Exhibit 46. This accretion was firmly attached to the Kansas bank, many witnesses testifying that they had walked out upon the accretion for distances varying from half a mile to two miles. About 1917 an ice jam occurred which caused a part of the channel to run down low places across this accretion, forming a chute, cutting off the disputed land from the Kansas bank and thus forming the large island. For a considerable period, the main channel remained on the north and east side of the island, that is, along the

Missouri or left bank but gradually by reason of other ice jams, and particularly one in 1928, the Kansas channel was greatly enlarged and thereafter the Missouri channel gradually dried up and has been for some time completely dry. The land which was thus cut off, which was and is now the disputed territory, never lost its identity. The shifting of the stream back from the left to the right bank was not by erosion but was as above stated.

We respectfully submit that the following numbered Findings of the Master are erroneous: 6, 7, 8, 9, 10, and 11; that the said numbered paragraphs should be stricken out and the following be substituted in lieu thereof:

> 6. That, beginning at some time between 1900 and 1907, the water in the river began to veer away from its former main channel next to the Kansas bluffs and to cut into and erode the banks on the left or Missouri side of the river, and as this change in its flow progressed three things developed, viz. (1) gradual accretion to the fast or solid bank on the right or Kansas side of the stream, (2) the said accretions formed on the right side of the stream included the lands in dispute lying between the present channel and the bed of the channel of said stream in 1928, and (3) the formation of a split or double channel of the river through most of Forbes Bend from and after 1917.
>
> 7. That ice jams occured at or near Mileage

station 515 in Forbes Bend in 1917 and 1928, and other small ice jams at other times, which contributed to some degree to an avulsion change in the river, resulting in a channel across the accreted land which finally became and is now the main and only channel of said stream.

8. The main navigable channel of the Missouri River changed from its original position occupied by it in the year 1898 near the Kansas bluffs to the extent that said channel was forced to the north and east toward the left or Missouri side of the river, by erosion of the Missouri bank and accretions adhering to the banks on the right or Kansas side, which accreted lands remain in existence at the present time and include the disputed area now on the Missouri or left side of the present channel, having been cut off from the Kansas bank as above stated by a channel forming about 1917 and increasing until it became the main channel of said river, and the original channel ceased to flow.

9. That the same or virtually the same natural forces which progressively diverted the flow of the river toward the north and east in Forbes Bend until the cut bank on the Missouri side and along the left bank of the farther branch of the divided channel had by gradual erosion reached within a short distance of the Burlington Railroad tracks, did not operate in like manner to turn the main volume of water back into its accustomed channel to the south and west in the vicinity of the higher grounds of Kansas, but said change of said channel back to its present location was brought about as above stated by reason of a channel cut-

ting across the accreted land through a chute in 1917 which gradually increased until it became the main and is now the only channel between said Station 515 and 510.

10. The river moved to its farthest point in a northeasterly direction by the gradual process of erosion and accretion and did not return to its present channel by that process and the disputed land did not form as an island in the channel of said stream but formed originally as an accretion attached to the Kansas bank and became an island only after the river flowed across the said accretion in 1917 and thereafter, as above stated.

11. The boundary line between the states of Kansas and Missouri in the Forbes Bend area between Mileage Stations 510 and 515, as numbered according to the 1890 system of surveys and measurements, or from the upper to the lower end of the disputed Forbes Bend area as indicated in Stipulation, Part one and Stipulation, Part two, (Complainant's Ex. 1-A, File 4 and complainant's Ex. 123-A, File 4) should be and is a line that follows and coincides with the middle line of the main navigable channel of the Missouri River as it was located in 1928 at a point near the present railroad and as indicated on the Peret map (Complainant's Ex. 55).

If said Findings be amended as above suggested, then the Conclusions of Law numbered 1, 2, and 3 should be stricken out and the following substituted therefor:

1. That the claims set forth in Paragraphs VI and VII of complainant's Bill of Complaint

whereby it asserts title to and the right of sovereignty and jurisdiction over certain lands in the Forbes Bend section of the Missouri River, which are now wholly separated from the mainland of Kansas by the present main channel of said river are sustained by sufficient evidence.

2. That the complainant, the State of Kansas, has a valid claim or title to the land in Forbes Bend beyond and to the north and east of the main channel of the Missouri River as it now flows.

3. That the aforesaid lands to the north and east of the Missouri River in the Forbes Bend area, herein claimed by the State of Kansas, rightfully belong to it and are under its sovereignty and subject to its jurisdiction and control; that it is lawfully entitled to their possession, use and enjoyment, and to exercise complete and unrestricted dominion over them, with such incidental powers as constitutionally attach to or inhere in its self-governing political authority as a state of the Union, and its title confirmed and quieted against all adverse or hostile claims or pretensions of claims of the Respondent and of all persons claiming or to claim by, through or under it; that Respondent, the State of Missouri, should be perpetually restrained and enjoined from disturbing or molesting it, the State of Kansas, its civil or political subdivisions, public officials, and other inhabitants in the possession and enjoyment of the aforesaid lands and from interfering in any way with the exercise by Complainant of full and untrammeled jurisdiction and control over said territory.

If such amendments be made in said Conclusions of Law, then the recommendation for a decree should be modified by striking out the last paragraph on page 100 of the Master's Report down to and including the words "in Holt County, Missouri," and inserting in lieu thereof the following:

> "Thence from the place where the Missouri River intersects the west line of Section twenty-eight, Township fifty-nine North, Range thirty-eight West, Holt County, Missouri, on down the course or channel of the said Missouri River following the thalweg of the said Missouri River in the left or Missouri channel thereof as it flowed at the time of the second avulsion in 1927 or 1928, and as indicated on Complainant's Exhibit 46, the same to be definitely fixed and determined by a survey to be made under the direction of the Master by competent engineers, unless the Complainant and Respondent can agree upon the location of said line, to a point in the present course or channel of said Missouri River opposite which the left bank of said river intersects a North and South center section line of Section one, Township fifty-eight North, Range thirty-eight West, in Holt County, Missouri."

The Complainant very respectfully but most earnestly prays that its exceptions to the report and recommendations of the Special Master be granted, that the Report

be amended in Findings and Conclusions of Law as above suggested, and that such further proceedings as may be necessary be directed by order of the Court.

Respectfully submitted,

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No. 8. Orig.

JAN 25 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

THE STATE OF KANSAS, *Complainant,*
VS.
THE STATE OF MISSOURI, *Respondent.*

BEFORE
HONORABLE SAMUEL M. WILSON, LEXINGTON,
KENTUCKY, SPECIAL MASTER

BRIEF ON BEHALF OF RESPONDENT

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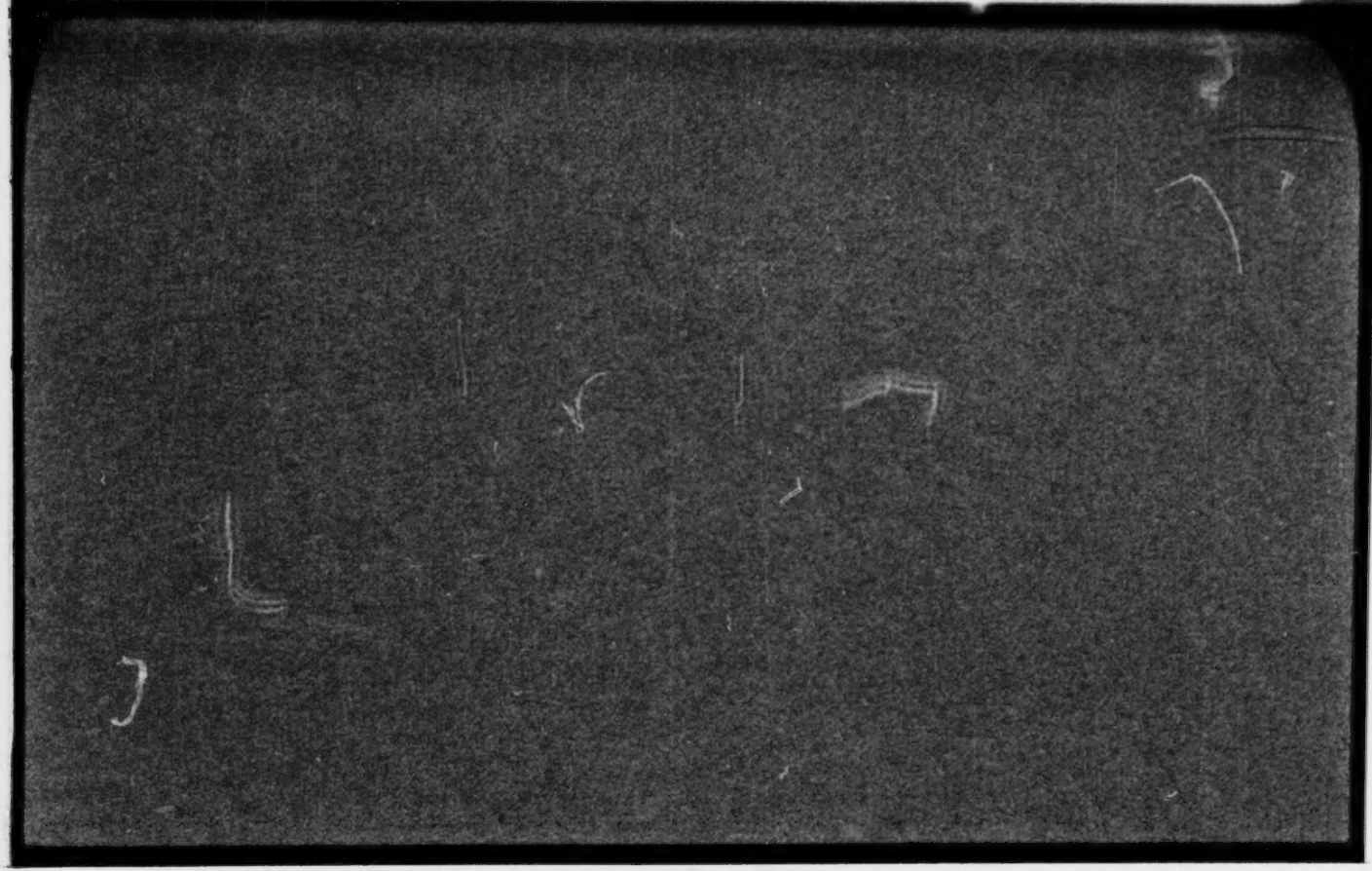

INDEX.

	Page
STATEMENT	1
EVIDENCE	2
Witnesses:	
Dave Barbour	2
E. L. Green	5
Carl Harrison	6
Clarence Harper	7
Clay Hudgins	9
Bryan Hudgins	11
Glenn Wagoner	12
Ed McCoy	12
Avon H. Murray	14
John Dyer	15
Ralph Dyer	16
James Fitzgerald	17
Harvey H. Hall	18
William Metcalf	20
Elmer Wales	21
Ed Cotten	22
Verde Harrison	23
Raymond Dyer	23
Mrs. Murel Dyer	25
Clarence Dinwiddie	25
John Frazier	27
Clate Schaeffer	27
Mrs. Edna Schaeffer	28
W. L. Moore	29
Floyd A. Dankers	30
POINTS AND AUTHORITIES	32
ARGUMENT	34
Point I	34
Point II	43
Point III	46
Point IV	48
Point V	51
CONCLUSION	53

INDEX OF CASES AND AUTHORITIES

Cases: Pag

Arkansas v. Tennessee, 247 U. S. 461, 38 Sup. Ct. Rep. 557, 62 L. ed. 638. 3
Arkansas v. Tennessee, 269 U. S. 152, 46 Sup. Ct. Rep. 31, 70 L. ed. 206.. 3
Commissioners v. U. S., 270 Fed. 110 3
Davis v. Anderson-Tully Co., 252 Fed. 681 3
Franzini v. Layland, 97 N. W. 499, 502, 120 Wis. 72 3
Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55 3
Louisiana v. Mississippi, 50 L. ed. 913, 202 U. S. 1 3
Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, 64 L. ed. 558, 564 3
Missouri v. Kentucky, 78 U. S. 395, 20 L. ed. 116, 119 3
Oklahoma v. Texas, 260 U. S. 606, 67 L. ed. 428 3
State v. Muncie Pulp Co., 104 S. W. 437, 456, 119 Tenn. 47 3
Veatch et al. v. White et al., 23 Fed. (2d) 69 3
Washington v. Oregon, 214 U. S. 205, 53 L. ed. 969 3

Authorities:

Corpus Juris, Vol. 9. page 271 3
Corpus Juris, Vol. 59, page 54 3

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BEFORE
HONORABLE SAMUEL M. WILSON, LEXINGTON,
KENTUCKY, SPECIAL MASTER

BRIEF ON BEHALF OF RESPONDENT

STATEMENT

Respondent, in this brief, will not incumber it by citing additional authority covering the principles of evulsion, erosion, accretion and thalweg, the principles of which have been set out by the complainant in its brief.

Respondent believes there is not much dispute between the complainant and respondent as to what principles of law control the issues herein and states that the solution of the problem is primarily to be determined by the facts.

The respondent's position in its brief is that there is presumption that the lands in controversy are within the State of Missouri because they are situated east and north of the Missouri River, which was designated as the boundary line between Missouri and Kansas and that the burden is upon the complainant to show by clear and convincing evidence that the boundary line as of today between Kansas and Missouri, is different from the location of the Missouri River as it flows today.

The respondent contends that the land in controversy belongs to Missouri because it came into existence as a Missouri island: (1) that it came into existence before the flow of the river was divided on the east or Missouri side of the middle of the main channel of the Missouri River, or, (2) that it came into existence after the flow of the river was divided by being formed on the east or Missouri side of the main channel of the Missouri River or the channel on the Kansas side.

Respondent contends that the main channel of the Missouri River has always been in the vicinity of the Kansas bluffs and that the main channel of the Missouri River at no time ever shifted to the northern or Missouri branch of the Missouri River; that since the Missouri branch was never the main channel of the Missouri River, that whether the Missouri branch joined with the Kansas branch, which was the main channel of the Missouri River, by evulsion or by gradual process, has no effect upon the boundary line between the states and that the boundary remains in the vicinity of the Kansas bluffs or in the middle of the main channel of the river as it flows today.

EVIDENCE

DAVE BARBOUR

Dave Barbour testified that he was 64 years of age, and lived at Oregon, Missouri; that he was born in the North Half of the North Half of the Southeast Quarter of Section 21 Township 59 Range 38 in Holt County, Missouri, and the Forbes Bend was a little bit below where he was raised; that he was raised straight North of the present mouth of the Wolf River, and North of Lookout Mountain on the North side of the river; that he lived in that neighborhood all his life except five years that he worked on the river in Kansas City, and except seven years he was in Colorado, from 1907 to 1914. When he first remembered the Missouri River, it cut off the Southwest Quarter of Section 21 and went south toward the mouth of Buffalo Gulch, then di-

rectly along the Kansas Bluff to old Lafayette, and that he was acquainted with the river from about 1885 on (p. 726). Witness with red pencil (p. 727) drew a red line around the foot of Lookout Mountain to indicate where Wolf River formerly emptied into the Missouri. He fixed the time as about 1885. The Missouri River then began to cut in the Wolf River bottom and cut out the mouth of Wolf River (p. 728); in 1902 he testified he was rafting on the river and stayed all night just above the mouth of Wolf River; in 1904 he settled on the bar up above Wolf River and the river cut off the upper end of this bar and cut off a part of the Wolf River bottom and went straight on along the bluff (p. 729). Witness with the letter "X" indicates the location of the Dyer bar (p. 730), and indicated with the word "farm" where their farm was in 1903; both of these marks were made on Respondent's Exhibit 3. The witness identified the island to which he went in 1904 with the letter "B" (p. 731). The witness testified that the river began to cut in on the bar where he lived in 1904, and that it cut out the bar that Adams' had his fishing camp on near the mouth of Wolf River, and that it commenced to cut in the Forbes Bend area about 1900 (p. 732); that the river was moving north and east and cut through in the George Quick farm, Frank Wagoner farm and Ed Forrester farm, and through the McWilliams land, and then began to swing off to the south and east (p. 732). He stated that the river began flowing on both sides of the bar somewhere about 1903, and continued in that manner until about 1928 or 29 (p. 732). He stated that he was rafting in 1920 and that he was running a raft down by the David Hahn land, and cut down about to where the Baker's schoolhouse was located; that he had some trouble getting his raft through, and he got across over to the Kansas Bluff; that he had a raft about 150 feet long and 52 logs wide, and that a little difficulty in getting the raft through, and that thereafter all the rafts that he ran followed right down along the side of the Dyer bar. The witness testified that from 1902 on as long as he had known the river, there had been plenty of water on the

south side of the island (p. 734); that the Missouri channel commenced to fill up in '21-24, and was a gradual process (p. 735); as the Missouri channel filled up, the water followed the main channel of the river south of the island on down toward Lafayette and Mosquito Creek; (p. 736); that the only boats he saw go up the river was a Government snag boat, and that he and others were fishing along Hahn's place in some deep, dead water, and that this boat came around the south side of the island and up by Hahn's place and pulled out two big snags; and as they went on around the bend to get into the main channel of the river, that they had to buck sand for about two and one-half miles, and they finally got their boat through and the river began to cut on the David Hahn farm and never stopped until it had cut it all into the water. This happened about 1925.

Witness testfied that he was around the vicinity of the river in 1917, and that he didn't see any ice jams around Pardee Dyer's place; that he didn't see any high water at that time; that there was an island forming in the river and that was as early as 1903 (p. 739), and that it was later that they had the divided channel and that he remembers that when he came back from Colorado in 1914 that there was a divided flow and that the island had about 400 or 500 acres in it, but that he wouldn't be positive whether the water was flowing on the North side of the island when he came back from Calorado. He testified that the island got bigger in size and was probably a half a mile wide and one mile long (p. 741) at the time Mr. Cole went over there, and that the water was flowing on both sides at that time. He testified that the water began leaving the north chute along in '26 or 27, and that the north chute gradually filled up (p. 742) and that the water probably quit flowing through the north channel in 1930. The witness stated that the north channel got within about one-fourth or on-half of a mile of the Burlington tracks, but that it was not the main flow of the river (p. 742). He stated that when he was fishing in that vicinity between 1921 and 24, that he figured that the main channel of the river was south of the island,

and from then up until '27 or '29 that the deepest and widest channel was on the south side of the island (p. 743). He testified that part of the time when they were fishing on the south side of the island that the south channel was widening out and was cutting off some of the bar on the Kansas side and was cutting out some on the smaller channel on the north side of the river, and that in 1923, that the main channel of the river was on the south side of the island (p. 744). He stated that the river was one-quarter of a mile wide from the south side and about one-quarter of a mile on the north side, but that it wasn't all channel like it was on the south side (p. 746).

E. L. GREEN

E. L. Green testified that he was 72 years old, now a resident of Los Angeles, California, and formerly a resident of Missouri, where he had lived in Oregon about 67 years; that he was familiar with the river since he was 22 years old, and that his first recollection of the Missouri River was that it ran then about as it does now. Witness testified that the river started to cut about the Hahn place and that it cut mostly in June,, and that it would cut the sand out from underneath the land and the land would drop in the river; that on one piece of land he had, there was one cotton wood tree cut in three times standing straight up, and that there was a well 17 or 18 feet deep stood there while it cut out and made back three times and the river never did wash it out (p. 756); that there was two islands, the Ad Dyer bar and that after the Missouri River cut Wolf River off, it dried up a bar on the north side of the river (p. 756); and that the river in high times cut around that and made the island that is in litigation; that the island as first formed was a sandy bar, but that the wash from the river made better land out of it, and that the river flowed on both sides of the island, and after four or five years, when it would get high, would keep cutting a little farther north and then the water would recede and go back in the water bed, and that in his estimation there never was but

one river bed (p. 757). He stated that the north channel cut his land and that the channel was divided at that time; that there is no flow around the north side now. The witness testified that he did not see any ice jam around Pardee Dyer's place in 1917, nor did he notice any change in the course of the river at that time (p. 758). At the request of the Special Master, the witness attempted to identify Buffalo Gulch on Respondent's Exhibit No. 3, but was unable to do so. He designated that it was about one-half the way between Lafayette landing and Wolf River (p. 759). The witness stated that when he first knew the river that Wolf Creek came out in the bottom, turned around and went right down the Kansas Bluff, and that after a while the Missouri River cut into Wolf River; that as long as he has known the river, there never was a time that there wasn't a flow of water on the south side or the Kansas channel of the river (p. 760).

On CROSS EXAMINATION, the witness testified that he owned some land on the north side of the river that was not cut in, and that he got a patent from Holt County for some land in 1937; that he did not see an ice jam in 1917, and was not saying that there was not an ice gorge. He stated that the river cut his land and quit on several occasions, and that he had lost about 17 acres in the river. He stated that the river was about three and one-half miles wide as it passed his place at the high time (p. 763), and that it was very narrow when it was cutting in his land, and that he understood that Baker's schoolhouse had been cut into the river.

CARL HARRISON

Carl Harrison testified that he was 60 years old and lived at Forbes, Missouri, and was engaged in the business of farming and banking; that he was familiar with the vicinity around the Hudgins' place since 1914, and that Hudgins lived two miles south of Forbes, and about two miles west; and east and south of Jamieson's Bar. He stated that when he came there in 1914 that the river was

doing its main cutting and that it continued for three or four years, and that the river had a divided flow, part on the south side of the island and part on the north side (p. 767). He testified that the last time he noticed high water on the north side was 1921, and that after that it kept getting a little less on the north side until about 1929 or 1930, and that he had never noticed any more water in the north side then except sloughs. He testified that the south branch of the river in 1921 got larger gradually and that ever since 1914 there was a good channel or flow of water on the Kansas or south side (p. 768). He stated that he saw some snag boats go up the north channel of the river and throw some logs out, and turn around and come back and go up on the south side of the bar, and that it did not seem to have any trouble going up the south side.

CLARENCE HARPER

Clarence Harper testified that he was 41 years of age, and lived at Forbes and had been postmaster there for 12 years and that prior to that he had worked for the Burlington Railroad Company. The witness testified that he became acquainted with the Missouri River in the vicinity of Forbes Bend when he was about 15 or 16 years old (p. 770), and that he remembers about 1915 that the river had cut back to about the Baker's schoolhouse (p. 771) and that the river continued to cut. He remembered that there was a divided flow of the river and that it continued up to about 1930 or 1931 from about 1915. He testified that from 1915 to 1930 that there never was a time that there was not a substantial flow of water on the Kansas side of the river (p. 771) and that he was back and forth over there and very familiar with that side of the river; that the northern branch of the river filled up in 1931 and 1932, and that it did so gradually over a period of seven or eight years (p. 772); that during that time, the Kansas branch stayed about the same. The witness testified that Mill Creek flowed into the Missouri branch at that time and emptied on to the bar and came around the north channel and

deposited a lot of sediment. The witness stated that all the boats he saw went up the Kansas channel and that he never did see any going up the north chute. The witness testified that he was working for the Burlington Railroad in 1928 and they made a survey of the river about Mr. Green's place to see whether or not it was getting close enough to the track to cause them any trouble, and at just about that time the river quit cutting north and east, and they decided that the river was leaving, and they did no protective work (p. 773).

On CROSS EXAMINATION he testified that he first went to the river about 1915 and that he knew where Lafayette was and where Mr. Cole's place was and that he had heard of Buffalo Hollow but did not know where it was located (p. 774). He stated that in 1915 that the river with reference to Lafayette and Mr. Cole's farm was farther south than the present channel is now, and that there was river on both sides of the bar at that time, which contained about 1,000 acres. He stated that there was a good sized channel about one-quarter of a mile wide on the Kansas side and that the water on the Missouri side was about the same (p. 775); that the flow of the river on the north side kept getting less all the time until it finally played out in about 1931 (p. 775), and that the Kansas channel was getting bigger. Witness testified that in 1928 the biggest part of the river was on the south side (p. 776), and that there was a chute running on the north side, but not very much. He also stated that in 1923 the biggest part of the channel was on the south side and about one-half mile wide, and that the channel on the Missouri side was about one-half that large (p. 777). He stated that the island in 1923 was about two-thirds as large as it is now, and that he wouldn't call it an island now, because there was no water on the north side at normal times; that Mill Creek had carried a lot of dirt over the island; that in 1923 there were some cotton woods five or six inches in diameter on the island and that he did not know whether or not it had been cultivated (p. 779), and besides the two channels of the

river, there were many chutes that flowed across the island.

CLAY HUDGINS

Clay Hudgins testified that he lived about two miles south and two miles west of Forbes; was 57 years of age and was born and raised on the Hudgins' place which was along the east shore of the Missouri River. He stated that Judge Ryan's land along the bluff was about a mile west of their place; that the Baker's schoolhouse was a mile west and three-quarters of a mile north of his place. The witness testified that he had been acquainted with the Missouri River since he was of school age, approximately since about 1890, and that in 1890 the river flowed right over next to Lafayette Bluff. He stated that the river gradually got away from there and ate back into Missouri territory—it commenced to cut in about three miles west of their place near Wolf Creek (p. 782) and it got within a quarter of a mile of the Burlington Railroad, and then took a Southeastern course, coming across various farms and cutting them into the river, and down by the Baker's school property that the river cut in about 200 acres of Hudgins' land. The witness testified that his earliest recollection of there being a divided flow in the river was in 1918 (p. 783), and that it continued in a divided flow until about 1927; that in 1927, a steamboat attempted to get through the northern channel and couldn't get through, and it had to come back and go up the south or Kansas channel. He stated that there ceased to be any flow in the north channel in normal times about 1930, and that the Kansas channel was gradually getting wider and deeper, but that there was never any sudden change in the north branch or south branch of the river (p. 784). He testified that in his recollection there never was a time that there was not a substantial flow of water in the Kansas channel of the river (p. 784). The witness testified that he has about 160 acres of land in the disputed area which he acquired by County patent about 1932, and that his brother, Bryan Hudgins, has an interest in

it. He stated that Mill Creek, at the present time, empties into the river about one-half a mile above their house and that it at one time emptied into the Missouri channel about two and one-half miles from his house, and it carried a lot of sediment. The witness testified that since he has known the river, that the largest and greatest body of water was on the south side of the bar, although the flow was about equal for a while (p. 786); that he saw no ice jam in the vicinity of Dyer's in 1917, and that he was up and down the river quite often during that time; that there was not any sudden change in the Kansas channel of the river during 1917, and that there never was a time that the Kansas channel was dry (p. 786).

On CROSS EXAMINATION, the witness identified his farm on Complainant's Exhibit No. 56 and marked it with the letter "H" in red pencil. He testified that his land was high land and that the river was up 16 feet and that there was still seven feet of bank left (p. 789); and that west of his place is some more land. He pointed out the location of Mill Creek and the erosion bank. The witness testified that the channel varied in width while it was cutting his land; that sometimes the channel was narrow, sometimes 200 or 300 feet wide and that he had no judgment as to how deep the channel was. He stated that in 1915 that the river flowed by the Baker's Schoolhouse and that he and his brother raised the building to keep it from going into the river (p. 791), and that at that time there was a good sized stream on the south side of the island. The witness testified that before the river was divided in its flow that the river was about one-quarter of a mile from Lafayette and it was about one-quarter of a mile from the river to Cole's place (p. 792). He testified that the river was cutting into the Missouri bank about 1914 or 15 in the vicinity of Baker's schoolhouse. The witness testified that the D. A. Baker land fell into the river (p. 795) in about 1917, but witness could not identify the location of Chambers School.

BRYAN HUDGINS

Bryan Hudgins testified that he lived four miles Southwest of Forbes, Missouri, and was 44 years old, a brother of witness, Clay Hudgins, and had lived all his life on the place known as the Hudgins farm. He stated that he lived at the place marked "H" on the map, designated as Complainant's Exhibit No. 56. The witness stated that he remembered the flood of 1903 and where the Missouri River was at that time, and that the river ran along the Kansas Bluff past Lafayette on up toward Lookout Mountain (p. 799). He first saw that river cutting about three or four miles upstream near the vicinity of Wolf River in about 1907 or 1908 (p. 800). He believed that the erosion on the Missouri land ended about 1920 (p. 800). He observed that the flow of the river was divided around 1914 or 1915, and at that time the flow was about fifty-fifty (p. 801). He stated that he had seen the boats go up both sides of the river and in 1921 and 1922 saw some on the Missouri side, but did not know whether or not they got through (p. 801), and that the Missouri side discontinued to a flow except at high water stage about 1932 or 33 (p. 802), and that it had begun to fill up about 1925 and gradually became smaller (p. 802). The witness stated that as the water gradually became less on the Missouri side, it correspondingly increased on the Kansas side, but that there never was a time since he had been familiar with the river that there wasn't a substantial and considerable body of water in the Kansas branch of the river (p. 802). He stated that he and his brother owned 330 acres in the disputed area and that it lies along the old erosion bank and runs north from the house about a mile and varies in width. Witness stated that he did not notice any sudden change in the channel of either the north branch or the south branch of the river, and to his knowledge there never was a time that either was dry and commenced to flow water within a day or so (p. 803).

On CROSS EXAMINATION, he stated that he first saw the island about 1914, and that it possibly contained about

200 or 300 acres (p. 804), but that he could not see the head end of the island. He stated that from his first recollection, the river ran on the Kansas side and it gradually ate into the Missouri side taking in the various farms known as Baker's, Devorss' and Gore's, and that it moved until it got within a quarter of a mile of the railroad track. Witness stated that the river started from the Kansas side and that it never deserted the Kansas side looking from his place (p. 805). The witness stated that prior to 1914, as far as he could see, that there was just one river, and it was on the Kansas side (p. 806), and that the flow became divided about 1914. He stated that there was no sudden change in the river and that it gradually ate into the Missouri land (p. 807), but he could not tell exactly when the Missouri channel dried up, but he thought about 1932 or 33 (p. 807). He stated that in normal times the Missouri side was about 500 feet wide and that the Kansas channel was about equal width and was referring to the year 1914; that the Missouri channel gradually came over into the Missouri land and the island got bigger and as the north channel dried up it increased the side of the Kansas channel (p. 808).

GLENN WAGONER

Glenn Wagoner (p. 811) stated that he was 40 years old and lived in the vicinity of Oregon, Holt County, Missouri all his life; that he can remember the location of the Missouri River since about 1917. The witness stated that he lived close to the Chambers schoolhouse and upon Complainant's Exhibit No. 46, identified Chambers schoolhouse as the place marked "X" on the map; that he lived south and east of the schoolhouse and the witness made a red "X" on said exhibit to indicate where his home was. Witness testified that when he first recalled the location of the river, that the flow was divided and never knew the river before there as a divided flow (p. 814).

ED McCOY

Ed McCoy (p. 815) stated that he lived five miles south of Oregon at the time of the trial and had previously lived

at Forbes; that before he moved to Forbes, he lived on the Lewis Holbert place south of Forbes and within one-half a mile of the river (p. 816). His place there adjoined the Hudgins' place on the east. The witness stated that when he first became acquainted with the river that it flowed just about where it does now mostly by the Kansas Bluff; that in 1915, the river began to cut where the Baker schoolhouse was (p. 817), and continued to cut more to the east and finally cut down by the Hudgins' place; then there was quite a considerable flow of water on both sides (p. 817). Witness stated that Complainant's Exhibit No. 46 fairly represented the way the water flowed in the year 1923 (p. 817), and that the water continued to flow in divided channels for quite a while, and that the north channel finally filled up (p. 818). The witness stated that in 1921 that he moved over on the lower end of the bar, which was referred to as Jamieson's Bar and made a "Y" with a brown pencil on Complainant's Exhibit No. 46 to indicate where he moved and that he moved there in April 1921 and stayed until June of that year when the water forced him off the bar (p. 818); that he did not move back. The witness testified that in normal times there was as much water on one side as the other of the island; that the north branch started to fill in, mostly up next to Mill Creek (p. 819) which is a drainage ditch which carries a lot of sediment. Witness testified that as the Missouri channel was closing up that the Kansas channel was getting larger, but that he never did see the river when there wasn't a channel on the south side or the Kansas side of the island (p. 820). He stated that he observed steamboats going up the river next to the Kansas side, but never saw any go up the Missouri side, and that there was plenty of water over on the Kansas side (p. 822).

On CROSS EXAMINATION, the witness stated that in 1915, he moved out in the bottom next to the river and had been around the river for the last 30 years; that he went up the Mill Creek occasionally; knew where Chambers schoolhouse was and was in that vicinity several times, but

did not know where Lookout Mountain was, as where Pardee Dyer lived. He stated that he knew where Lafayette was, although he had never been there and had been over on the Kansas side several times in a boat. He stated that he didn't do much fishing, but rode around quite a bit and hunted ducks. He stated that the channel on the Missouri side and the Kansas side were about the same size, and that the Missouri branch cut some in 1921 and later, and that it reached its fartherest point east, in his judgment, about 1922 (p. 824).

AVON H. MURRAY

Avon H. Murray stated that he was 47 years of age and at the time of the trial lived one-half mile east of Oregon, and was engaged in farming and fruit growing. He stated that he lived in the vicinity of the Missouri River between 1915 and 1923 on the River Side Farm located in Sections 21, 22, 23 and 26, and that the house on the farm was across the road east from the Chambers school (p. 826). He testified that in 1915 when he moved there that the Missouri River was south of the farm, and that it had started to cut in toward this farm about 1913. He stated that in 1915, the flow of the river was divided, and there was a small island out in the river, and that the river was hitting over toward the mouth of Wolf River and that was throwing it southwest of where he lived (p. 827). He stated that they tried to build some deflecters to prevent the river from cutting, but couldn't finance it, and that this was before the Government had done any improving along that part of the river. He stated that the river continued to cut to the north and east until about 1922 or 23, when it stopped cutting (p. 830); that all during his acquaintance, there was a channel on both sides of the river (p. 830) and that the Missouri channel began to close up in 1924, and as the Missouri channel closed up, the Kansas side gradually began to get larger (p. 831).

On CROSS EXAMINATION, he stated that when he moved on this farm in 1915, that the river was cutting into

it and had started cutting on Section 26, and finally between 1915 and 23, they lost about 240 acres into the river (p. 832). He stated that the small island referred to was south from Mill Creek; that he knew where Lafayette landing was and crossed over to the Kansas side several times above the island; that at normal stage, the river was about one-fourth of a mile wide on each side; that the island or bar near Mill Creek was about three or four hundred feet wide, and was finally cut out by the river.

JOHN DYER

John Dyer stated that he was 66 years old and lived 3 miles and a half southeast of Forbes, Missouri, and had lived there all his life. He stated that in 1895 or 96, the river went around the Kansas side and continued to flow there until it got started to cut on the Missouri side in about 1910 (p. 835). He stated that the Missouri River got to cutting in on Wolf River and that threw the channel over next to the Missouri side, and that the river started to cut and kept on cutting for a period of years (p. 836). Witness testified that the bar was formed when the river commenced to cut on the Missouri side, and that the river cut to the north and east about three-fourths of a mile and went on down around by the Will Baker farm; that there was always a channel on the Kansas side of the bar of about three-fourths or a mile wide (p. 837). He stated that he knew where Mill Creek was, and that the river changed the course of Mill Creek, and that now Mill Creek comes down around the old bar where the river used to flow (p. 838); that there was no sudden change in the river (p. 838). Witness stated that he brought a suit in the Circuit Court of Holt County against Mr. Hatch, who was a tenant on the Cole land, and that he won the suit and got Mr. Hatch off the land.

On CROSS EXAMINATION, he stated that he didn't know the nature of the suit, and that he remembered the river since 1910; that it had a divided flow since about 1922 (p. 841).

RALPH DYER

Ralph Dyer testified that he was 43 years old; lived at Forbes, Missouri; had spent considerable time around the Missouri River in that vicinity, and had lived east of the Hudgins' property. He stated that when he was a kid, the river ran along the Kansas Bluff (p. 843), and later ate into the Missouri side for a number of years; that it did its worse cutting from 1914 up to 1923. He stated that the flow divided about 1913 or 14; that there was an island out there in the center of the river along about Lafayette (p. 843), and that the island split the channel. He stated that there was just about as much water on one side as there was on the other, and that the river was about one-half mile wide on each side (p. 844). He testified that there was no flow in the north side of the river in 1928 or 29, and in 1928 he went over to his cousin's, Pardee Dyer's, and went across the river in a motor boat, and that all the channel was in the Kansas side (p. 845), and that there has always been a channel on the Kansas side ever since he could remember (p. 845). The witness stated that as the river would get up, it would fill in on the Missouri side and every spring would build it higher on the Missouri side, and as it gradually built up, the river gradually left to the Kansas side.

On CROSS EXAMINATION, he stated that it took about 10 years for the Missouri channel to fill up, and that it was done gradually, and filled up each year as the river would get up; that the Missouri channel switched around quite a bit and worked itself away from the Missouri side; that the river did not cut out the island, nor the two channels come together (p. 848); that during the time the Missouri channel dried up that the Kansas channel got larger. The witness testified that the island was about one-half mile long in 1924, and about 100 yards wide; that it was about two miles from the Missouri channel at that time (p. 848); that when the river was that wide, that there was mostly sand bars or little streams and chutes now and then; that there were no chutes through the island which was higher

than the rest of the bar (p. 849). He testified that the island was small at first and then it kept getting bigger all the time as it filled in from this side (p. 849); that the island had no chutes running through it, but the bar did, and that there were 600 or 700 acres in the bar, and at its widest part was about three miles wide; that is, three miles clear across the bar to the Kansas River over on the Kansas side in about 1925 (p. 849). He stated that he first remembered the river about 1909 and at that time was living below Hudgins' about one-half mile; that he moved away in 1909, but that he was up and down the river about five or six times a year thereafter visiting his relatives.

JAMES FITZGERALD

James Fitzgerald testified he was 36 years old and had lived in Oregon, Missouri, for two years, and prior to that time, in the years 1915 and 16, had lived on a farm about a mile and a half east of the Hudgins' place (p. 851). The witness is County Assessor of Holt County. He remembered that the river was divided in about 1918 or 21; that the river was divided about fifty-fifty at the normal stage; that the Missouri channel started to close up about 1923, and that he did not know when water ceased to flow through the Missouri branch, but that he had made trips around there a year or two later and there was very little water in the Missouri channel (p. 853). He testified that as the Missouri channel was filling up, the water was going back to the Kansas side and the channel was getting larger; that he never did see the time when there wasn't any water in the Kansas channel, and that there has not been any sudden change in the Missouri River since he was acquainted with it (p. 854). He testified that this property which is north and east of the present flow of the Missouri River is carried on the assessor's books in Holt County, and that he has no interest in the litigation.

On CROSS EXAMINATION, he designated on Complainant's Exhibit No. 46 where the Hudgins' place was and where he lived; that he was not a frequent visitor in

the Chamber school neighborhood, not very well acquainted with the Wolf River vicinity; that his knowledge of the river was farther down toward the Hudgins' place; that the river across from Wolf Creek was about three-fourths of a mile wide and that his information regarding this vicinity is about the south and easterly portions and doesn't know much about the vicinity around Mill Creek; that the majority of Jamieson's Bar had pretty heavy willows on it, some sand and not much vegetation, and some cultivated land around 1935.

HARVEY H. HALL

Harvey H. Hall (p. 861) stated that he lived at the present time five miles north of Forrest City, and from 1916 to 1929, he lived in Holt County, one-half mile east of the Hudgins' place; then bought a place one-half mile farther east and lived there until 1929. He stated that he did quite a bit of hunting and fishing during these years along the Missouri River; that he hunted on the bar and that every Sunday or so, they went up from Hudgins' place to Wolf River (p. 862) and they usually went up on the Kansas side of the bar; if there was water enough, they would come back on the Missouri side. He testified that he first became acquainted with the Missouri River in 1916, and that then between Wolf Creek and the Hudgins' place, the river was on the Kansas side right up near to the bluff. He stated that he first saw the divided flow about 1916, and that the river was divided by an island out in the middle of the river, and the island was out aways from the high bank; that the island kept growing and getting larger (p. 863) and that finally the river built up a big island. The witness testified that they had quite a bit of land in the bottom and was interested in the cutting by the river, and they tried to get the Woods Brothers to do some work on the river; that they went up the river to try to determine the cause of the river's cutting and found it was hitting into the mouth of the Wolf River and that was throwing it back against the Missouri side lower down; there was a bar in the river

known as Schaeffer's Bar, which was almost across from the mouth of Wolf Creek and above Chamber's school, and when the river cut a point off the Schaeffer's Bar, that let the river hit right on the point of the island, known as Jamieson's Bar (p. 864); that when the river started to cut the point off the Jamieson's Bar, the Missouri channel commenced to dry up and the Kansas channel began to get bigger and finally it quit running on the Missouri side, only when the river was high (p. 865). He had seen lots of boats go up on the Kansas side, for example Woods Brothers Construction Boats and snag boats; that an old snag boat got stuck going up the Missouri side and had to turn around and come back and go up the Kansas side (p. 866), but they never had any trouble going up on the Kansas side, except once in a while they would get off of the main channel and into a sand bar for a little bit (p. 866). The witness testified that there was no sudden change in the course or location of the river in 1917, and that in 1917, he heard of an ice jam, and as they had a lot of wheat in the bottom, he went to investigate; he and his father drove to the Hudgins' place and walked up the bar, and part of the time on the ice, up to the head of this bar, and that there was no ice gorge there (p. 866), but that there was report of an ice gorge at Rulo (p. 866). The witness stated that between 1916 and 1929, he was on the river two or three times a week, and that there was always a substantial channel on the Kansas side and that it never did dry up (p. 867).

On CROSS EXAMINATION, he stated that they were trying to get all the neighbors together to get Woods Brothers to do some work on the river, but they couldn't finance it, because the majority of the people wouldn't sign up, and as a result no work was done by the Woods Brothers (p. 868). The witness located Schaeffer's Bar on Complainant's Exhibit No. 46, and put a circle with a red pencil to designate it, and stated that it was right across from Wolf River on the Missouri side. He stated that the bar was there about 1916 or 17 before it started cutting.

The witness on the same exhibit indicated a place south and westerly from the Northeast Quarter of Section 1, Township 58 North, Range 38 West, as the Hudgins' farm, and stated that he lived about a half a mile east of that point on a farm containing 229 acres (p. 871), and that the wheat referred to was north of where he lived in Section 6. He stated that he walked across this bar to ascertain whether or not there was an ice jam, and walked to the head of the bar, a distance of about two miles at that time (p. 872) and that the bar at that time did not extend above the mouth of Wolf Creek and that all of it was below the mouth of Wolf Creek. He stated that there was water to the south as he walked across the bar and that there was a little chute that went through the bar on the Kansas side, and that the main river was right along close to the bar at that time. He stated that when he first knew the bar it was bare, and they hunted geese on it and then some little willows came up in a year or two and then they got big; that at times you didn't have to cross any water to get to the bar on the Missouri side, but some years there would be a chute running there. He stated that he recalled when the flow of the river was approximately evenly divided; that he thought it was about 1919, the year they were trying to get the Woods Brothers to do this work (p. 873) and that the Missouri channel started to close up about 1922 and it gradually got smaller.

WILLIAM METCALF

William Metcalf testified that he was 65 years old and lived at Forbes, and was not so familiar with the Missouri River in the north part of Jamieson's Bar, as he was with Mill Creek down the river past Forbes. He stated his first recollection of the river was in 1886, and at that time it was mostly on the Kansas side, and that there was an island there at that time he was acquainted with the river south from Hudgins' down to McAfee's; that the island he was talking about was in the vicinity of Hudgins' place. He testified that west of the Hudgins' place, the river was next

to the Kansas Bluff as far as you could see (p. 876); that he first noticed a divided flow in the river about 1916, and that the flow was about equally divided, there being about the same amount of water on each side (p. 876) until about 1920 when the high water went down, the bar had built up to the north. He stated that the Missouri channel never really closed up until the river work was done, but that there probably wasn't any flow in it after 1930; that the river kept whittling off the bar and cut out a bigger channel about where the river used to be (p. 877). He stated that the channel wasn't as swift in 1920 as it was in the 1917 high water, but that in 1920 there was a flowing channel on the Missouri side, and that about 1930 was the date when the water ceased to flow in normal times through the Missouri channel (p. 878); that there was no sudden change in the location of the Missouri River in 1917.

On CROSS EXAMINATION, he stated that after 1920, the flow of the Missouri side decreased, but that he could not tell how much it had decreased, because bars had formed, and when the river would rise it would spread out over the bars, but the water was not swift and he could not compare the flow on the Missouri side in 1923 with 1920.

ELMER WALES

Elmer Wales stated that he lived two miles west of Forbes, Missouri, on a farm and had lived there since 1915 in the vicinity where the Guyer's and Barrett's lived, and north and east of Baker's schoolhouse about two miles. He stated that the first year he was there, he and his father-in-law went out by the Baker Schoolhouse and bought a bar near the Bill Baker place. He stated that he remembers when the flow of the river was divided and that he watched the biggest part of the Jamieson's Bar build up (p. 880) and that there was a good channel on both sides of the bar from around 1918 up to 21 or 22; that the channels were about the same size and about 300 yards wide (p. 881). The witness stated that Complainant's Exhibit No. 46 fairly represented the flow of the river and Jamieson's Bar in 1923

(p. 882) and the location of the two respective channels at that time. He stated that there ceased to be an appreciable flow in the Missouri channel about 1924 except at high times (p. 883). He stated that he was one of the directors on the Board of Directors for the Mill Creek Drainage Board, and that the ditch carried a large volume of sediment, logs and trash (p. 883). He stated that he was interested in knowing whether the river was going to leave or not and that he often went to the point of the bar and there always seemed about as much water on one side as the other (p. 884) and that there never was a time that he was up there that there wasn't any water on the Kansas side, and that he did not notice any sudden change in the channel or location of the river in 1917. The witness stated that he lost 56 acres of land in the river about three miles west of Forbes, and that the river has built it back (p. 884).

On CROSS EXAMINATION, witness stated that as far as he could remember there was always a flow on the Kansas side; that he had been over to the river on the Kansas side several times and had been up to the point of the bar quite a few times (p. 885). He testified that he saw cutting on the Missouri side south and east of where Mill Creek emptied into the channel from about 1916 to 1923 (p. 886); that he didn't think there was any channels in normal times in the Missouri channel in 1928.

ED COTTEN

Ed Cotten testified that he was 81 years old and that he used to live on Avey Baker's place north of the Baker's schoolhouse. He stated that in 1920, the river was located close to Baker's schoolhouse, and that the schoolhouse caved in the river (p. 889); that at that time there were two channels, one went up the Kansas side and one up the Missouri side, and that they finally joined near the Hudgins' place. He stated that about 30 years ago, he lived on the Proctor place which was close to the Hudgins' place, and that he saw boats going up the Kansas side and that they started up the Missouri side and they would have to back

up and go up the Kansas side (p. 890). The witness stated that the Missouri channel commenced to close up about 1923 or 24 and closed up about 1932. He stated that the Missouri River was over on the Kansas side and always had been, and there never was a time that there was not a channel on the Kansas side (p. 890). He stated that he had no interest in any land in the disputed territory.

VERDE HARRISON

Verde Harrison testified that he lived about three miles and a half Northeast of Forbes in Holt County, Missouri, and had lived in the neighborhood of Forbes Bend from 1914 up to 1922, and from 1928 to the present time; in 1914 when he moved there, the Missouri River was on the Kansas side and had just commenced to cut some (p. 892) and it finally cut down to the Hudgins' corner about 1918. He stated he was away from 1922 to 1928, and that when he returned all the channel was over on the Kansas side, and there was practically no flow on the Missouri side (p. 893). He stated that in 1928, the Kansas channel was at least one-half a mile wide; that from 1914 to 1921, while he was living there, he noticed no sudden change in the condition of the river, and did not notice any sudden change from 1928 on.

On CROSS EXAMINATION, he stated that prior to 1930, he lived on a farm in the bottom about three or four miles east of Hudgins' corner and had farmed the land since 1914; that he had never heard of Mount Vernon, never farmed in the vicinity of Mill Creek, but knew where it was and had been up there several times, and that he observed the river a dozen or half a dozen times a year.

RAYMOND DYER

Raymond Dyer testified that he was 39 years of age and lived in the vicinity of Forbes all his life and was born on a farm near the river about one-quarter of a mile south and east of the Hudgins' place; that he remembered the river since about 1914 and always farmed close to the river.

Witness stated that in 1914 the river was pretty much on the Kansas side (p. 898). He stated that both channels looked like they were both about the same size and that he was farming down in there in 1923 and 24 right against the river and that the same situation existed, that the Missouri branch closed up in about 1934 (p. 899) and that while the Missouri channel was closing up, the Kansas channel was gradually getting larger. The witness testified that there has always been a channel on the Kansas side ever since he had known the river and that there was not any sudden change to his knowledge (p. 900). He stated that he was a cousin to Pardee Dyer and visited him frequently, and visited him in 1917 and that Dyer made no statement to him about any ice gorge in 1917.

On CROSS EXAMINATION, he stated that he had been to Dyers about four times since 1917; that the first time he noticed a divided flow was along in 1917 when they went swimming up near Strickland Crossing, which is down stream probably a mile from Mill Creek; that 1917 was his first recollection of the river and there was a divided flow at that time, and that he did not remember the river before it was divided (p. 903). He stated that he worked around Mill Creek in 1928; that he went to the island one time when Cole lived there and that Cole had a little shack on the island and he didn't notice any cultivated land or see any animals or farming implements (p. 904); that in walking over to the island from the Missouri side that they crossed no water, but that there was water below where they crossed.

In answer to interrogation by the Special Master, witness replied that he lived on the bank of the river and noticed the banks caving in and that was the reason they moved to the hills and that after the bank quit falling in the river that it began to grow and build up for a distance of a quarter of a mile (p. 907).

MRS. MUREL DYER

Mrs. Murel Dyer testified that she was the wife of Raymond Dyer, a daughter of Ed Cotten and she lived on the Cotten farm until 1928. She stated that she remembered the river since about 1916 and at that time there was a channel on both sides (p. 910); she continued to live in that vicinity until 1926; that she could see the Missouri channel from where she lived and went over to the vicinity of the Kansas Channel; that the Missouri channel and Kansas channel were about the same size at that time. She stated that since 1926, when she moved to the town of Forbes, that she would see the river two or three times a week; that the Missouri channel filled up about 1932 or 33 and began to fill up about 1923 (p. 912); that while the Missouri channel was filling up, the flow of the water was through the Kansas channel and the steamboats went up the Kansas side (p. 912); that she had seen steamboats go up the Missouri side, but didn't know the time. The witness stated that there never was a time that the river changed its locaton suddenly and that the change was made gradually (p. 913).

On CROSS EXAMINATION, Mrs. Dyer testified that she had been on the Kansas side of the river, knew where Pardee Dyer lived and had been to his home; that she lived 2½ miles northeast of the Hudgins'; recalled the location of the Baker's school and attended the Chamber's school; she stated that she observed willows growing on the bar, never noticed any barns or houses, didn't know whether anybody farmed the bar.

CLARENCE DINWIDDIE

Clarence Dinwiddie testified that he was 38 years old; had lived in Oregon, Missouri, about 30 years, and had done quite a bit of hunting and fishing around the Missouri River; that his first acquaintance with the river was about 1916, and at that time the river was against the bluffs at Wolf River, and then it flowed in a easterly direction for

about a mile; then the river was divided and one-half of the water was on the Missouri side and one-half on the Kansas side (p. 920). He stated that the Missouri River dried up gradually and the flow through the Missouri channel ceased about 1930; that it commenced to fill up about 1920 or 22, and that the Kansas branch gradually took the water that had been going down the north branch (p. 921). The witness testified that the Mill Creek emptied into the Missouri branch and that the river started to fill down next to the Hudgins' place or Elmer Wales' place (p. 921), and that it gradually filled back up around the bar. He stated that Schaeffer's Island was located south and west of Forrest City and east of the Squaw Creek Drainage ditch and east about a mile and a half north of Wolf River, and that years ago he observed the river cutting on Schaeffer's Bar (p. 922), but noticed no change in the river around Wolf Creek. He testified that when the channel was divided about 1916 that the flow was divided equally; that he never saw the Kansas channel dry and that there was no sudden change in the location of the river, and that its changes were made over a period of years. He testified that during all these years, he spent considerable time in the Forbes Bend area; that he kept a boat near Forrest City and did a lot of boating up and down the river to hunt and fish (p. 924).

On CROSS EXAMINATION, the witness testified that Squaw Creek drainage ditch emptied into the Missouri River from the north side. He stated that Squaw Creek drainage ditch was about two miles west of Forrest City; that the island had about 1000 acres of land in it and that the Northwest side was the highest point; that the bar extended north and west of where Mill Creek drained out and there was land west of where Mill Creek emptied into the Missouri; that the bar extended down the river probably from two to four miles, and that Hudgins' owned the land on the south end of the bar. The witness stated that the northern channel of the Missouri channel ceased flowing

about 1930; that in 1915, the channel was about equally divided and continued through the years until the northern channel closed up.

JOHN FRAZIER

John Frazier testified that he was 71 years old and he lived south of Forrest City, Missouri, about five or six miles from the river, north of where Wolf Creek flows into the Missouri (p. 929); that he lived there since 1875 and has known Wolf Creek all these years. The witness stated that Complainant's Exhibit No. 46 shows Wolf Creek to have about the same position as it did when he first became acquainted with it; that there was not much change in the location of Wolf Creek during the years as to where it flowed into the Missouri River; that there was no bar formed on Wolf Creek but one, about three or four miles below Wolf River. Witness stated that he is familiar with the location of Schaeffer's Bar, which is located about one-quarter of a mile west of his place; that the river did some cutting on Schaeffer's island that it started cutting on Schaeffer's island about 1903 and continued about five or six years (p. 932), and that in about 1927 or 28 that it cut off the point of Schaeffer's island that stuck out in the stream (p. 932). He stated that after the point was cut off that it left the north side, and Mill Creek commenced to fill in (p. 933). The witness stated that Wolf Creek was west of Lookout Mountain and flowed into the Missouri River, and that 50 years ago it ran down along the Bluffs and that now it runs right square north into the Missouri River (p. 934) about the same place he first knew it.

CLATE SCHAEFFER

Clate Schaeffer testified that he lived 2½ miles south of Forrest City, Missouri, on a farm on the Missouri River, and had lived there all his life. His first recollection was about 1900 and at that time between Wolf Creek and the Hudgins' place, the Missouri River ran along the Kansas Bluff, but there was a chute on the Missouri side (p. 936).

The witness was referred to Complainant's Exhibit No. 46 and put an "X" on the map to indicate where he lived at that time. He stated that he lived three miles due west of Chamber's school and that Wolf Creek was just south of their home place; that Little Tarkio and Squaw Creek were the same stream (p. 939). He stated that in about 1911 that there were two channels in the river and that it was cutting in their land and that it was cutting on that place for about 20 years. The witness stated that the Missouri channel gradually filled up and the water went over to the Kansas side and that he never did see the Kansas channel of the river when there was no water in it (p. 942).

On CROSS EXAMINATION, the witness stated that he was unable to point out on Complainant's Exhibit No. 48 where the dividing channel was; that he could if he knew the map, but that the island was right south of their place and the divided flow would begin right south of their place.

MRS. EDNA SCHAEFFER

Mrs. Edna Schaeffer stated that she was 47 years old; lived about 2½ miles south of Forrest City, and lived in that vicinity since she was married in 1913; that she knows where the Forbes Bend is located and that it was south of where she lived, and that she lived on the Dave Barbour farm from 1925 to 1930; from 1913 to 1925, she lived on the Schaeffer home place until the river cut it in, then moved to the Adolph place, which was about one-fourth of a mile from the Schaeffer schoolhouse and close to the river (p. 946). She stated that she got acquainted with the Missouri River in the vicinity of Wolf Creek in 1925, when she moved to the Barbour farm. The witness stated that she did not know where Lookout Mountain was; knew where Mill Creek was located and knew where Squaw Creek was located, which was about five or six miles north of Mill Creek, and that Chamber school was north of Mill Creek. The witness designated Chamber's school was "CH" on Complainant's Exhibit No. 47, which was a map of the year 1926. Witness stated that she remembered that in 1925

there was a bar opposite the Chamber's schoolhouse and that the river seemed to be divided around the bar about fifty-fifty; that she made occasional trips to the river and that the flow of the river began to get smaller about 1927 or 1928, and that the Missouri branch did not fill up very fast; that there was water still flowing through the Missouri channel in 1930 when she moved away (p. 951).

On CROSS EXAMINATION, she testified that she never did see an ice jam on the Missouri River; that there was an overflow about 1928 and that before the overflow, the channel was divided and she did not know where the main flow was after the overflow (p. 953). That she visited the river occasionally and did some fishing in Mill Creek, but that she observed the Missouri River in the Forbes Bend area about four or five times a year or a little oftener. (p. 953).

W. L. MOORE

W. L. Moore stated that he was 53 years old, was engaged in the grocery business at Oregon, Missouri and that all his life he had been acquainted with the Missouri River; that he first became acquainted with it about 1906-1908; that he was engaged with his father and a Mr. Murray in the apple business, and he looked after the business in the Forbes Bend area and brought apples along the river. He stated that he married one of the Dungan girls and that his father-in-law owned about 1500 acres in the vicinity near the Baker's schoolhouse. The witness stated that between 1908 to 1911, that the Missouri River was over by the Kansas Bluff and that about 1918 he was out to Shirley Lane and that the river had cut back into the lane (p. 956). The witness stated that in 1918 that the river was divided in its flow. The witness indicated that Shirley Lane runs east and west between Sections 25 and 36, as it appears on Complainant's Exhibit No. 55; that about 1918 to 1919, he saw a snag boat stuck at the end of Shirley Lane and they turned around and went back to the main channel or Kansas channel (p. 959); that the channel remained divided for several

years although he did not recall how many; that the Missouri channel finally filled in over a period of about 10 years and that in normal times, the water ceased to flow through the Missouri channel in about 1932. He stated that he was up and down the river each year and that there was always a flow on the other side (p. 960); that he never recalled of ever seeing the river when there was not a channel on the Kansas side.

On CROSS EXAMINATION, the witness stated that he was not as familiar with the river upstream from the Hudgins' place as he was downstream; that in 1917 or 18, the river got down to the end of Shirley Lane and had a divided flow; that the channel on the Missouri side was not very wide—about 300 feet, and in that year it was cutting up past Shirley Lane, but that after 1918, he did not notice it cutting at all, and that was when he noticed the snag boat trying to go through that channel and when it had to turn back (p. 962). He stated that he didn't say that the river was filling up in 1918, but the snag boat tried to get through the Missouri channel and that it had to turn back (p 963), and that was the only boat he ever saw go up or down the Missouri channel; that he did not know the depth of the Missouri channel during the low water times of 1917, 18 and 19.

FLOYD A. DANKERS

Floyd A. Dankers testified that he was County Clerk of Holt County and had been since 1931, and lived at Oregon (p. 964). On the Complainant's Exhibit No. 53, the witness drew a line with a red pencil to show the location of Shirley Lane and that it runs west between Sections 25 and 36. The witness stated that he was 44 years old; was born and raised in Holt County and had been acquainted with the Missouri River since he was 10 years old, but that his acquaintance with Forbes Bend area has been since 1931. The witness identified Respondent's Exhibit 25,

and stated that it was pages 16 and 17 of the Index to the field notes of the survey of Holt County by M. Lewis Clark, surveyor general, in regard to the sections and meander lines of the Missouri River for Sections 1 and 2, Township 58 North, Range 38 West and also sections and the meander lines of the Missouri River in Township 59 north, Range 38 West.

POINTS AND AUTHORITIES.

I.

Respondent contends that the land in controversy came into existence as an island and was formed on the east or Missouri side of the middle of the main channel of the Missouri River and as such became the property of and under the jurisdiction of the respondent at that time and that thereafter no change in the Missouri River, no matter how it occurred, could divest respondent of its title or jurisdiction; that the island was formed on the Missouri side of the middle of the main channel before the flow was divided or was formed after the flow was divided on the Missouri side of the middle of the main channel of the river, or the Kansas channel, long before the Missouri branch became the main channel, if it became such.

Franzini v. Layland, 97 N. W. 499, 502, 120 Wis. 72;
State v. Muncie Pulp Co., 104 S. W. 437, 442, 119 Tenn. 47;
Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55;
Louisiana v. Mississippi, 50 L. ed. 913, 202 U. S. 1;
Washington v. Oregon, 214 U. S. 205, 53 L. ed. 969;
Arkansas v. Tennessee, 247 U. S. 461, 38 Sup. Ct. Rep. 557, 62 L. ed. 638;
Missouri v. Kentucky, 78 U. S. 395, 20 L. ed. 116, 119.

II.

The Complainant has failed to produce enough evidence of sufficient probative value to prove a change in the location of the main channel of the Missouri River from the bluffs or Kansas channel of the river.

Missouri v. Kentucky, 78 U. S. 395, 20 L. ed. 116, 119;
Commissioners v. United States, 270 Fed. 110;
Davis v. Anderson-Tully Co., 252 Fed. 681.

III.

Respondent urges that if the Special Master should find that the main channel of the river was located as contended by the Complainant, then the respondent insists that the said river, before it ceased its flow, moved South and West away from the old reosion bank line and built accretions to the Missouri land.

Arkansas v. Tenn., 247 U. S. 461, 38 Sup. Ct. Rep. 557, 62 L. ed. 638;
Commissioners v. U. S., 270 Fed. 110;
Davis v. Anderson-Tully, 252 Fed. 681;
Veatch et al. v. White, et al., 23 Fed. (2d) 69.

IV.

There is a presumption in favor of a permanence of boundary lines and the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature.

Corpus Juris, Vol. 9, page 271;
State v. Munice Pulp Co., 104 S. W. 437, 456, 119 Tenn. 47;
Oklahoma v. Texas, 260 U. S. 606, 67 L. ed. 428.

V.

Line of greatest depth of water is not necessarily the middle of the river channel for purpose of determining state boundary.

Arkansas v. Tennessee, 269 U. S. 152, 46 Sup. Ct. Rep. 31, 70 L. ed. 206;
Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, 64 L. ed. 558, 564;
Corpus Juris, Vol. 59, page 54;
Veatch et al. v. White et al., 23 Fed. (2d) 69.

ARGUMENT.

I.

Respondent contends that the land in controversy came into existence as an island and was formed on the east or Missouri side of the middle of the main channel of the Missouri River and as such became the property of and under the jurisdiction of the respondent at that time and that thereafter no change in the Missouri River, no matter how it occurred, could divest respondent of its title or jurisdiction; that the island was formed on the Missouri side of the middle of the main channel before the flow was divided or was formed after the flow was divided on the Missouri side of the middle of the main channel of the river or the Kansas channel, long before the Missouri branch became the main channel, if it became such.

All of the witnesses of the complainant testify that the channel of the Missouri River originally was next to the Kansas Bluffs. Its witness John H. Simpson (R. 451) stated that in 1887 the river ran along the Kansas bluffs and also in 1898 (R. 458) and in 1901 (R. 459).

Witnesses Isaac Muse (R. 539) John Kotsch (R. 412) and Esta Surles (R. 267) testified that the Missouri River ran next to the Kansas bluffs in the year 1900.

Charles Baskins (R. 493) testified that in 1889 it ran along the banks of Lafayette and that the channel did not change until along in 1913 or 1914.

Pardee Dyer (R. 190) testified that in 1892 the river ran along the Kansas bluffs in front of his land.

William Leach (R. 449) testified that the river ran along the Kansas bluffs in 1903.

Ed Martin (R. 241) testified that in 1904 that the channel ran along next to Lafayette.

John E. Simpson (R. 520) testified in 1905 that the main channel ran close to the Kansas bluffs.

Nettie Martin (R. 250) testified that to her knowledge the river ran along the Kansas bluffs from 1881 to 1907.

When Nettie Martin left in 1906, she testified that the main channel kept more on the Kansas side (R. 251).

Judge Ryan (R. 304-323) testified that in 1906 the channel ran next to Lafayette landing.

On the part of the respondent the following witnesses testified that there was always a substantial channel and flow on the Kansas side of the river.

Witness Green testified that there was only one river channel and that was on the Kansas side (R. 760).

Witness Harrison (R. 468) testified that he was acquainted with the river since 1914 and that there was always substantial channel on the Kansas side.

Witness Harper (R. 771) testified that from his acquaintance from 1915 to 1930 there was always substantial channel on the Kansas side.

Witness Clay Hudgins (R. 784-786) testified that there was always a substantial flow in the Kansas channel.

Witness Bryan Hudgins (R. 802) testified that there was always substantial flow on the Kansas side and (R. 805) that the river never deserted the Kansas side and (R. 806) that there was just one river; that it was on the Kansas side prior to 1914.

Witness Ed McCoy (R. 820) testified that there was always channel on the Kansas side prior to 1915 (R. 820) and (R. 822) and that he never did see any boats go up the Missouri side.

Witness Avon H. Murray testified that between 1915 and 1923 that there was always a channel on the Kansas side.

Witness Harvey H. Hall (R. 867) testified that there was substantial channel on the Kansas side between 1916 and 1929.

Witness W. L. Moore (R. 960) testified that there was a substantial channel on the Kansas side since 1906-1908, and that in 1918 or 1919 he saw a snag boat attempt to go up the Missouri branch but the boat could not get through and had to go back and went up through the Kansas channel (R. 959).

Witness Clay Schaeffer (R. 942) testified that he did not know a time when there was no water on the Kansas side of the river. He was 81 years old, lived in the vicinity of Forbes Bend, that he did not remember when there wasn't a channel on the Kansas side of the river and that he saw boats go up the Kansas side and boats attempt to go up the Missouri side but that they had to back up and go up the Kansas side.

Witness Raymond Dyer (R. 900) testified that he was 38 years old, lived in the vicinity of Forbes Bend, that he was a cousin of Pardee Dyer (comp. witness) and that there was always a channel on the Kansas side as long as he knew the river and that he had no interest in the controversy.

Witness Clarence Dinwiddie (R. 923) testified that during the years he was acquainted with the river that he never did see the river when there wasn't a channel on the Kansas side.

Witness Elmer Wales (R. 884) testified that he was familiar with the river in this area since 1915 and that there was never a time when there wasn't a channel on the Kansas side.

Witness James Fitzgerald, County Assessor of Holt County (R. 853) stated that he had known the river since 1915 and that there never was a time when there wasn't a channel on the Kansas Side.

Witness John Garr (R. 835) testified that he was 66 years old and that when he first knew the river in 1895, that the channel ran along the Kansas bluffs and that as long as he had known the river there always was a channel on the Kansas side of the bar.

Witness David Barbour (R. 734) testified that from 1902 on, as long as he had known the river, there had been plenty of water on the south side of the island. He stated that he was 64 years of age and that in 1902 was rafting logs on the river and in 1904 settled on the bar up above Wolf river and that the river cut off the upper end of this bar and went straight along the bluffs and right on down along the bar (R. 729).

Respondent's Exhibit No. 4, which is a map showing the survey of the Missouri River of August 19—25, 1879, clearly indicates that there were islands in the Missouri River between the point where Wolf Creek entered the river at that time and Lafayette Landing. While this map appears to show a greater width of water on the Missouri side of the river from the island, yet all of the evidence in this case, both complainant's and respondent's, show that from the time of the admission of Kansas to the union, up until after 1900 that the main channel of the Missouri River flowed along and hugged the Kansas bluffs between the mouth of the Wolf Creek and Lafayette Landing.

Respondent's Exhibit 26, which was taken from a historical Atlas map of Holt County, Missouri, published in 1877, shows islands in the vicinity of Forbes Bend. The smaller island which appears to be in Section 28 is undoubtedly the island to which the lands in controversy are part as lands accreted thereto. It will be noted that this exhibit also shows the channel of the Missouri River in 1877 to have been along the Kansas bluffs and that the island was on the Missouri side of the channel at that time.

Respondent's Exhibit 3, which is a map published by the Missouri River Commission in 1893, showing the topography from the survey of 1879, shows that, in the vicinity of the Forbes Bend controversy and between the point marked "Look Out Mountain" and also the point where Wolf Creek entered the river as shown by red lines on said exhibit, and Lafayette Landing, there were island formations in the river at that time. This exhibit further sustains the respondent's position that the lands in controversy were accretions to an island which formed on the Missouri side of the main channel of the Missouri River. As stated above, all the evidence of both the complainant and the respondent shows that the main channel of the Missouri river was along the Kansas bluff from the admission of Kansas to the union up until about 1900.

Comp. exhibit 50, which is taken from a Holt County Atlas published in 1898 shows that there was an island forma-

tion in the vicinity of the lands in controversy at that time. This exhibit shows that the river had cut in most of Section 28 and a portion of the southwest part of Section 27. While the stream appears to be wider on the Missouri side of these islands at that time, yet that does not place the main channel there at that time; in fact as stated above, all of the evidence in this case shows that the main channel of the river was on the Kansas side of these islands, and flowed along the Kansas bluffs at that time. We find from the complainant's brief (p. 49) that it is admitted "that at the time that Kansas was admitted to the union, the Missouri River flowed close to the Kanass bluff-line and continued to do so until about the year 1895 or 1900".

Comp. Exhibit 51 also shows the same island formation opposite sections 27 and 35 of township 58, 59 Range 18 and 19 West. This exhibit is from the Standard Atlas of Holt County 1898, and with the complainant's admission, as stated above, that the main channel of the Missouri River in 1898 flowed along the Kansas bluffs, it would naturally follow that any island formations in the river at that time, in this location, were on the Missouri side of the main channel of the river.

Comp. Exhibit 52 which is an atlas from Holt County, Missouri dated 1918 shows an island in the vicinity of the lands in controversy. This exhibit also reveals that the river was flowing along the Kansas bluffs between Wolf Creek and Lafayette Landing. While this exhibit shows the wider space of water on the Missouri side of the island, yet it does not indicate that the main channel was on that side of the island, in fact this exhibit indicates a body of shallow water on the Missouri side of this island in 1918.

The oral testimony and the documentary proof from the time of the admission of Kansas to the union up until, including 1898, showed that the main channel of the Missouri River hugged the Kansas bluffs from Lafayette Landing north to Wolf Creek. There is no documentary proof as to where the main channel of the Missouri River flowed from 1898 to 1918 but the testimony of respondent's wit-

nesses supply this gap by testifying that the main channel of the Missouri River was always next to the Kansas bluffs before the stream divided as well as afterwards. There is no proof in the record by the complainant to contradict respondent's contention that the island formation, which developed in the vicinity in dispute, arose on the Missouri side of the main channel of the Missouri River. The complainants have failed to introduce any documentary proof to contradict the respondent's witnesses' testimony that between 1898 and 1918 the main channel of the Missouri River did flow along and hug the Kansas bluffs. The respondent's contention therefore, that this land originated as an island on the east or Missouri side of the main channel of the Missouri River is not refuted by the testimony of the complainant and is strongly supported by respondent's oral testimony and the aforesaid exhibit.

Complainant's Exhibit 59, 60, 61, 62, 63 and 64 are photographs of the premises in the vicinity of Forbes Bend. From an examination of these exhibits, it will be seen that the oldest timber and vegetation is on the Missouri side and it will also be noted that this heavy timber appears to be quite a distance back from where the river now flows. These exhibits also show some heavy timber on the Kansas side which would indicate accretions to Kansas land, which respondents do not deny. But directly across the river from where this heavy timber is shown on the Kansas side, it will be noted that there is practically no vegetation and that the timber growth appears to be younger at the water's edge and to increase in age back towards the middle or the central part of the land in controversy. These exhibits also reveal that from the central part of the lands in controversy, at which the heavy timber appears and extends towards the railroad track near which the erosion bank is located, that the growth of timber dwindled to practically nothing, which would indicate that these formations were accretions to the land which was formed on the main part of the island. Complaint's witness Francis A. Holton (R. 483) testified that he cut timber off the bar which was three feet in

diameter and they could get timber this size almost any where on the bar. This would support the respondent's theory that this land was formed as an island and was many years old in order to grow trees of that size and could not have been land accreted to the Kansas side after 1898, as contended by the complainants.

Complainant in its brief, at page 40, thereof, in referring to Complainant's Exhibit 46 refers to an island, "a 1890 mileage shown on this exhibit," referring to the testimony of Mr. Geiger pertaining to this Exhibit, states "that there was an island at this location in 1890." At page 42 of its brief, in referring to this Exhibit, complainant makes this statement: "* * * it could indicate that it would be filled in from 1890 because as shown here, they have a dotted island at that time. * * *" This exhibit further shows the 1890 channel, which clearly indicates that this 1890 channel ran between the aforesaid island and the Kansas bluff, which would place the island in Missouri.

The respondent contends, if the Special Master should find that the lands in controversy did not originate as an island in the Missouri River prior to the division of the flow as referred to in this case, that nevertheless, the land in dispute came into existence as an island during the separation of the flow and was on the East, or Missouri, side of the main channel of the river at the time that it became an island.

The respondent contends, and such contention is supported by its witnesses, and documenting exhibits showing that the main channel of the Missouri River at all times was along the Kansas bluffs. Respondent contends, and is supported by its witnesses, that, even though the flow was divided, the main channel of the Missouri River at all times flowed down the Kansas branch or channel of the Missouri River.

Complainant's Exhibit 46 is the first map that was introduced showing the soundings after the river had a divided flow. That map clearly shows the formation of an island between the two branches of the river. An examina-

tion of this Exhibit will disclose that in 1923 the depth of the Kansas channel was far in excess of the requirements for river traffic as shown by Complainant's witness Geiger (Complainant's Brief, page 43). This Exhibit shows that through the Kansas channel that the water got as deep as thirty-one feet near the Kansas bluffs and that there was a depth throughout the Kansas channel of from twelve on up to thirty feet.

The respondent's oral testimony was to the effect that the Kansas channel was always the main channel of the river and that even when the flow was divided that there was always a Kansas channel near the bluffs on the Kansas side. There is no documentary proof to show the size of the Kansas channel or the Missouri channel prior to the date of this Exhibit, (46) to wit: 1923. Just when the island commenced to form is not shown by the evidence. It is not shown by the evidence when the Missouri channel became the dominant channel, if it ever did become such, but Complainant's Exhibit 46 shows that the Kansas channel was as large and as deep as the Missouri channel in 1923.

Conceding that this Exhibit shows a channel on the Missouri side which would be navigable it also shows the channel on the Kansas side as being navigable, but, since the Kansas channel is the shorter, then it naturally follows that it would be the principal navigable and navigated channel, which would make it the main channel. This principle is announced in *Franzini v. Layland* 97 *N. W.* 499, 502, 120 *Wis.* 72. Also in *State v. Muncie Pulp Co.* 104 *S. W.* 437, 442, 119 *Tenn.* 47; *Iowa v. Illinois*, 147 *U. S.* 1, 37 *L. ed.*, 55; *Louisiana v. Mississippi*, 50 *L. ed.* 913, 202 *U. S.* 1; *Washington v. Oregon*, 214 *U. S.* 205, 53 *L. ed.* 969; *Arkansas v. Tennessee*, 247, *U. S.* 461, 38 Sup. Ct. Rep. 557, 62 *L. ed.* 638. In these cases the rule is announced:

> "* * * The jurisdiction of each state extends to the thread of the stream; that is, to the middle of the stream, and if there be several channels, to the middle of the bed, or, rather, the one usually followed."

The Complainant in its brief, page 175, recognizes this rule.

In support of respondent's contention that the Kansas channel at this time was the main navigable channel of the Missouri River, we call the Special Master's attention to the testimony of Respondent's witnesses to the effect that, at about this period of time and prior thereto, steamboats attempted to go through the Missouri channel, but that they were unable to do so and backed up and went through the Kansas channel without any difficulty. Respondent's witness, Carl Harrison (R. 768) testified that since 1914 he had seen boats go up and down the river at that location and that boats had started up the North channel from the Hudgins' place and had to turn around and come back and then went up the South channel without any difficulty. Respondent's witness, Clarence Hartner, stated that he was forty-one years of age and was familiar with the river since he was about fifteen years old, which would date his first knowledge of the river about 1916. He stated (R. 772) that he had seen steamboats running up the river and they all took the Kansas channel and he never did see one go up North or, the Missouri chute. Respondent's witness, Ed McCoy stated (R. 816) that he moved out in the river bottom about 1915 (R. 817) and that he never knew of a time when there wasn't a channel on the Kansas, or South side of the island and that he had seen several boats go up and down next to the Kansas side and had never seen any go up the Missouri side (R. 820). Respondent's witness, Harvey H. Hall, testified that he first knew the river in 1916 (R. 863) and that he had seen lots of boats go up and down the Missouri River on the Kansas side (R. 865), such as Woods Brothers Construction Boats, and that he saw an old snag boat get stuck upon the Missouri side and that it had to turn around and come back; and that he had seen several other boats start up the Missouri side but that they would have to come back and go up the Kansas side, or channel (R. 866).

Complainant's Exhibit 46 shows that a big island had already been formed by 1923 and that the Kansas channel

was the main channel of the Missouri River at that time. The above witnesses testified that long prior to 1923 the Kansas channel was the main navigable channel and that all the boats for years prior to 1923 went up the Kansas channel of the stream and that they could not navigate the Missouri, or North, channel and would have to turn back and go up the Kansas channel, if they attempted to do so. Respondent contends that this record discloses that long prior to 1923 when this island commenced to form that the main navigable channel of the Missouri River was on the South, or Kansas, side of the island and that the island came into existence on the East, or Missouri, side of the main navigable channel and, therefore, came into existence as a Missouri island. If the island came into existence as aforesaid then it makes no difference that the Missouri North channel later became the dominant channel, if such be a fact. *Missouri v. Kentucky* 78 *U. S.* 395, 20 *L. ed.* 116, 119.

Respondent contends that even though a comparison of Complainant's Exhibit 46, dated 1923, and later exhibits of respondent, might show a wider body of water in the Missouri channel than in the Kansas channel, such fact would not divest the respondent of its title or jurisdiction to the island if the island came into existence, as the evidence in this case shows, at a time when the Kansas channel was the main navigable channel of the river and, at a point East and on the Missouri side of the said Kansas main channel. (Missouri v. Kentucky, supra.)

II.

The Complainant has failed to produce enough evidence of sufficient probative value to prove a change in the location of the main channel of the Missouri River from the bluffs or Kansas channel of the river.

The Complainant, in its brief, refers to a number of exhibits and makes the statement that these exhibits are offered for the purpose of showing that there was a gradual eating away on the left bank of the river and, as a result,

the shore line was extended to the North and East. It further contends that as a result of this gradual eating away the main channel of the river followed along the left bank after it had been extended over into Missouri territory. The respondent concedes that there was, over a long period of time, a gradual eating away of the left bank of the river so that a great quantity of Missouri land went into the river. However, it submits that neither the evidence offered, nor the documents submitted, will support the complainant's theory that the main, or principal channel of the river was ever at any time on the Missouri side of the bar, or island, formations which came up in the river at the location here in controversy.

The Complainant refers to Exhibits 102 and 133, bearing dates of 1928, and contends that the principal flow was on the Missouri side at that time, while Exhibits 48 and 134, which were within two years of the dates of Exhibits 102 and 133, show that the purported Missouri channel had closed and the principal, or main flow of the channel was on the Kansas side.

An examination of Complainant's Exhibit 46, which was dated July, 1923, shows, according to the respondent's contention and the soundings, that the main and principal channel of the river at that time was on the Kansas side of this land which is in controversy. This contention is also borne out by respondent's witnesses, hereinabove referred to, which evidence showed that the steamboats took this route in going up and down the river.

Respondent also calls the Special Master's attention to Special Master's Exhibit A, which is made up from Surveys under date of 1924. This exhibit sustains respondent's contention that the main and principal channel of the river at this location was on the Kansas side, as is also shown by said Exhibit 46.

As to the probative value of Complainant's Exhibit 133, respondent respectfully calls the Special Master's attention to the fact that this exhibit does not show any soundings, measurements or distances. This exhibit on its

face shows that there is a wide strip of water on the Kansas side of this land; comparatively, the strip of water as shown on the Kansas side is as wide or wider than that which is shown on the Missouri side. There being no soundings showing the depth of either channel and no markings of where the channel is located, and no testimony as to where the channel of the river is with reference to this exhibit, for the complainant to offer this exhibit in support of its proposition that in 1928 the main channel was on the Missouri side shows that it is attempting to make its case by guesswork and conjecture.

The respondent insists that the record in this case discloses that the main channel of the Missouri River ran along next to and hugged the Kansas bluffs from Lafayette Landing to Wolf Creek prior to the time that there was a divided flow in the river; that, even though there was a divided flow in the river, the main channel of the Missouri river continued to flow through the Kansas, or South, branch of the river; that even though one branch of the river cut in on the Missouri banks and moved towards the vicinity of the Burlington tracks, that that branch at no time was the main and principal channel of the Missouri River and that the complainant has failed to prove it to be such. Such being true, the respondent insists that, whether the Missouri branch ceased its flow by avulsion or gradually over a period of years, such fact would not affect the boundary line between Missouri and Kansas because, under the evidence in this record, the complainant has not established that the Missouri branch was the main and principal channel of the river.

The respondent further insists that if the Northern, or Missouri branch of the river ever became the main or principal channel of the river, which the respondent denies, that it became such long after the land in controversy had been formed as an island to the East and on the Missouri side of the Kansas branch, which was, at the time of the forming of said island, the main and principal channel of the Missouri River; that if the said island was formed as a Missouri island

that thereafter the respondent's title or jurisdiction could not be changed by the action of the river regardless of how it occurred. *Missouri v. Kentucky* 78 *U. S.* 395, 20 *L. ed,* 116, 119.

The Complainant's brief clearly indicates that it does not rely very strongly upon the avulsion theory and, in fact, the brief supports the view that it does not rely at all upon this theory. Respondent makes this statement because, at page 248 of Complainant's brief it concedes that whether the new channel was begun by an avulsion or not is immaterial, because there is evidence that the channel of the river, which they contend flowed around the bend, that is, the Missouri side, did not come back by a process of erosion and accretion, but gradually ate around the lands in controversy and cut a new channel across them. The Complainant seeks to invoke the rule announced in *Commissioner v. United States*, 270 *Fed.* 110, and *Davis v. Anderson-Tully Co.*, 252 *Fed.* 681. The respondent insists that these cases are of no comfort to the Complainant because the Complainant has failed to establish that, at the time the purported Missouri channel did its changing, whether gradual or not, the Northern, or Missouri channel was the main and principal channel of the Missouri River.

III.

Respondent urges that if the Special Master should find that the main channel of the river was located as contended by the Complainant, then the respondent insists that the said river, before it ceased its flow, moved South and West away from the old erosion bank line and built accretions to the Missouri land.

The particular land to which we refer is shown in Complainant's Exhibit 55, which is a plat of the County school lands of Holt County, Missouri, showing lands in Townships 58 and 59, Range 38 West. This plat was prepared by Mr. Peret, County Surveyor of Holt County, in 1931.

Referring to this exhibit it will be seen that the left osion bank of the river ran through the Southwest Quarter Section 25, the Northwest Quarter of Section 36 and the outheast Quarter of Section 36 of Township 59, Range 38 Vest, and through the Northeast Quarter of Section 1 of ownship 58. This plat, at the date it was made, shows that e river had moved South and West, to the following deribed location: beginning about the central part of the outhwest Quarter of Section 25 and extending over into the outheast Quarter of Section 26, thence taking a southerly urse through the Northeast Quarter of Section 25 and ence bearing eastwardly across the Southwest corner of e Northwest Quarter of Section 36, and thence Southsterly across the West half of the Southwest Quarter of ction 36. All in Township 59, Range 38 West. Thence outheasterly across the Northwest Quarter of Section 1, ownship 58, Range 38 to the river. Also the following nds:

The left erosion bank on the northerly side of the lands controversy shows that this bank ran through the Northst corner of the Northeast Quarter of Section 27, across e Southeast corner of Section 22, northeasterly across the outhwest Quarter of Section 23, northeasterly and southsterly across the Southeast Quarter of Section 23, thence outheasterly across the Southeast Quarter of Section 24, ence Southerly to about the Quarter Section line in the orthwest Quarter of Section 25, all in Township 59, Range

This exhibit indicates the river at the time the plat as made and showed that the channel had moved in a utherly direction so that the channel at its last location n across the Northeast Quarter of Section 27, thence sterly along the North line of Section 26, thence Easterly d Southerly to a point in the Northwest Quarter of Secon 25, all in Township 59, Range 38.

Referring to Complainant's Exhibit 133, it will be seen at from this aerial photograph, made in 1928, the river d fallen away from the erosion bank line on the North and

filled in the aforesaid accretions. This had also occurred on the South and East side of the tract of land in controversy near the Hudgin's tract and had filled in accretions thereto.

Complainant's Exhibit 134, which is the aerial survey of 1930, reveals the same information. Complainant's Exhibit 134 shows a flow in the North channel considerably South and West of the old erosion bank and shows accretions being built up between that flow and the old erosion bank.

The above contention is supported by the following cases which announce the rule that even though an avulsion occurs, forming a new channel or the river gradually leaves the old channel and cuts around intervening land, making for itself a new channel, that this rule of erosion and accretion applies to the old channel so long as it remains a running stream. *Arkansas v. Tenn.* 247 *U. S.* 461, 38 *Sup. ct. Rep.* 557, 62 *L. ed.* 638; *Commissioners v. U. S.* 270 *Fed.* 110; *Davis v. Anderson-Tully* 252 *Fed.* (2d) 681; *Veatch et al. v. White et al.* 23 *Fed.* (2d) 69.

IV.

There is a presumption in favor of a permanence of boundary lines and the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature.

The above rule is announced in 9 *C. J.* 271, para. 300. The Supreme Court of Iowa in the case of *Kitteridge v. Ritter*, 151 *N. W.* 1097, announces the rule that the land, being concededly on the East side of the Missouri River, is presumed to be in Iowa. The land in controversy in this case is concededly East and North of the Missouri River and is presumed to be in the State of Missouri.

In *State v. Munci Pulp Co.*, 104 *S. W.* 437, the Supreme Court of Tenn., discussing the presumption, says, l. c. 456:

> "The question involved is the location of a boundary line. Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this

character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence."

"The party asserting that the course of the river has been changed by avulsion since the treaty became effective in 1881" has the burden of proving it. *Oklahoma v. Texas*, 260 *U. S.* 606, 67 *L. ed.* 428.

The respondent contends that the complainant has wholly failed to prove that the main channel of the Missouri River was in the North branch, or Missouri branch, of the Missouri River, at any time. Under the foregoing cases, the Special Master is required to find the issues against the Complainant and in favor of the Respondent. It may be that the Complainant has shown that there was water flowing through the North branch, or Missouri channel of the river, but its proof falls short by such a showing unless it establishes by a preponderance of the evidence that while the water was flowing through the Missouri, or North chute, that it became the main channel of the Missouri River.

The record in this case discloses that the Respondent's witnesses testified that the main channel of the Missouri River, from back in the '80's until up beyond 1900, flowed along and hugged the Kansas bluffs. Similar testimony on the part of the Complainant's witnesses establishes the fact that the main channel of the Missouri River flowed along and hugged the Kansas bluffs of the Missouri River from the beginning until about 1906. All the exhibits introduced in evidence showing the location of the Missouri River from the time of the admission of Kansas into the Union up to and including 1918, show that the main channel of the Missouri River ran along the Kansas bluffs. Complainant's Exhibit 46, under date of 1923, while it shows two flows on the river, discloses that the Kansas channel was as wide and as deep as the North, or Missouri, channel and that it was much shorter and, therefore, the practical channel. And the witnesses for Respondent testified that in 1923,

and for many years prior thereto, the Kansas channel had been used by boats as the only navigable channel in the Missouri River.

The Complainant admits in its brief that there is no documentary evidence from 1898 until 1918 showing the location of the main channel of the Missouri River. Such lack of evidence does not help the Complainant's case, nor help it meet the burden imposed upon it. The Complainant concedes that the main channel of the Missouri River was along the Kansas bluff until after 1900 and its Exhibit 46, under date of 1923, shows a navigable channel in the Kansas branch of the river, which is as wide and as deep as the one in the Missouri branch. It must be presumed, therefore, that between the years 1898 and 1918, that the main channel of the Missouri River was on the Kansas side and not on the Missouri side. In any event, the Complainant has not proved that between 1898 and 1923 the main channel of the Missouri River was over in Missouri near the Burlington tracks as they contend.

The Complainant contends, however, that Complainant's Exhibit 47, under date of 1926, and Complainant's Exhibit 102, under date of 1928, and Complainant's Exhibit 133, under date of 1928, show that the main channel of the Missouri River was on the Missouri side. These exhibits do show water on the Missouri side, and they also show water of varying width. The production of exhibits, however, showing widths of water does not prove the location of the main channel of the river. None of these exhibits has any soundings to prove the depth of the river and for one to conclude from an examination of those exhibits that the main channel of the Missouri River has shifted from the Kansas branch, where it has heretofore been established, to the Missouri branch, opens the field to guess-work and conjecture.

Complainant's Exhibit 46 is the only exhibit in evidence in this case which shows any soundings and would give the Court any idea as to where a channel of the river was located after the flow of the river was divided and that exhibit does

not support Complainant's contention that the main channel was in the Northern, or Missouri, branch of the river. The exhibits offered by Complainant showing the river at subsequent dates are of no probative value in determining where the main channel is located. Testimony of lay witnesses on the part of the Complainant as to how wide the river was, in the Missouri channel or in the Kansas channel, has no probative value in determining where the main channel is located. None of the Complainant's witnesses attempted to testify as to the depth of the river throughout its course in either branch in order to fix the main channel of the river.

Both Complainant's and Respondent's witnesses testified that the main channel of the Missouri River was near the Kansas bluffs until some time after the year 1900. The Respondent's witnesses testified that the main channel of the Missouri River continued to remain near the Kansas side from that date up until the time the War Department began to shove it slightly away from the Kansas side to its present location. Respondent insists that the above exhibits offered by the Complainant, and its oral testimony, are not of sufficient probative value to move the main channel of the Missouri River from the place where it has been definitely fixed by testimony offered by the Complainant and the Respondent. The Complainant has failed to prove, by clear and convincing evidence, that the main channel of the Missouri River ever was in the Northern or Missouri, side of the river, and has failed to introduce sufficient evidence to show that the main channel of the Missouri River ever moved away from its location on the Kansas bluffs, or from the Kansas, or South, channel of the river, after it divided.

V.

Line of greatest depth of water is not necessarily the middle of the river channel for purpose of determining state boundary.

The complainant appears to rely strongly on Exhibit 46 for the purpose of determining the boundary in 1923. It contends that this exhibit shows the deepest channel as

revealed by the soundings on the Missouri side of the land in controversy. Respondent does not concede that this exhibit so reveals. However, respondent submits that even though the deepest water was on the Missouri side at that time, that does not necessarily determine where the main channel is. The record in this case shows that the water on the Kansas side of the island at that time was of sufficient depth to afford river transportation. There can be no contention but that the route on the Kansas side of the island was the shorter and there is evidence in the record which reveals that this route was used. All things being equal, that is both channels being navigable, it stands to reason that the shorter channel would be considered the principal channel for the purpose of navigation. In support of the proposition that the principal channel is considered the main channel, we refer to the case of *Arkansas v. Tennessee* 269 *U. S.* 152, 46 *S. Ct.* 31, 70 *L. Ed.* 206; *Minn. v. Wisconsin* 252 *U. S.* 273, 40 *S. Ct.* 313, 64 *L. Ed.* 558, 564, wherein the court said:

> "The doctrine of thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

This same principle is announced in *Volume* 59 *C. J.* page 54. Also in *Veatch et al. v. White et al.* 23 *Fed.* (2) 69. It will also be noted from the statement by the court in the

Minnesota v. Wisconsin case, supra, that the court held that the deepest water and the principal navigable channel are not necessarily the same. So, applying that rule here, even if the deepest water were on the Missouri side, yet if the principal navigable channel were on the Kansas side of the island in 1923 when Complainant's exhibit 46 was made, then the lands here in controversy, were located in the jurisdiction of the State of Missouri and even though the main channel changed over to the Missouri side later, which we deny, that would not then place these lands in Kansas.

CONCLUSION.

The respondent insists that the complainant has not overcome the presumption that the land in controversy is within the bounds of the State of Missouri and that it has failed to produce clear and convincing evidence to show that the boundary line is different from the middle of the main channel of the Missouri River as it now flows.

Respondent insists that the evidence produced by the complainant leaves too much to guess and conjecture and does not meet the burden imposed upon it by law.

The respondent insists that the evidence in this case discloses that the land in controversy arose as an island in the Missouri River before the flow of the stream was divided and was formed on the east or Missouri side of the middle of the main channel of the Missouri River or that it arose as an island after the flow of the River was divided and that it came into existence on the east or Missouri side of the middle of the main channel or the Kansas branch of the Missouri River; that the main channel of the Missouri River since Kansas was admitted to the union has always flowed next to or near the Kansas bluffs and that the main channel of the Missouri River at no time ever shifted to the Missouri branch of the Missouri river and that the complainant has failed to prove such fact.

Respondent further insists that if the main channel of the Missouri River ever shifted to the Missouri or northern branch of the Missouri River, that it did so after the Mis-

souri island was formed and such fact had no effect upon respondent's title or jurisdiction of said island, which became the land in controversy.

If the Special Master should find that the land in controversy came into existence as an island before the river was divided and that it belonged to Missouri, such finding would place the present boundary line between Kansas and Missouri, between the location of the river as it now flows and the Kansas bluffs. The respondent feels that the location of the river as of today is more or less permanent due to the work thereon by the Engineering Department of the Government, and that it would serve no useful purpose for Missouri to have title and jurisdiction over the few hundred acres which would be situated on the Kansas side of the river and in the bend of the river.

The respondent therefore, waives any claim or right to the land on the Kansas side, which is situated in the bend of river and suggests that the boundary line under such circumstances should be fixed as the middle of the main channel of the Missouri River as it now flows.

While the respondent denies that the Missouri branch ever was the main channel of the Missouri River, if the Special Master should find that the northern or Missouri branch was the main channel of the Missouri River, respondent insists under this record that it became so after the island had formed on the east or Missouri side of the Kansas branch or main channel of the Missouri River and that such fact does not divest the respondent of its title or jurisdiction to the land in controversy.

If the Special Master should find issues as contended for by complainant, the respondent insists that there were large accretions which accreted to the Missouri side of the northern channel of the Missouri River prior to the time that the Missouri channel ceased its flow and that those accretions belong to Missouri and that the boundary line would have to be fixed at the middle of the main channel of the Missouri River as it was located at the time that the water in it ceased to flow and could not be fixed in the middle

of the main channel of the river as it was located at the point farthest north and east reached by it.

Respondent insists that the complainant has failed to overcome the legal presumption in favor of respondent and has failed to sustain its burden of proof by clear and convincing evidence and that the finding of the Special Master should be against the complainant and in favor of the respondent.

Respectfully submitted,

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vs.

THE STATE OF MISSOURI, *Respondent.*

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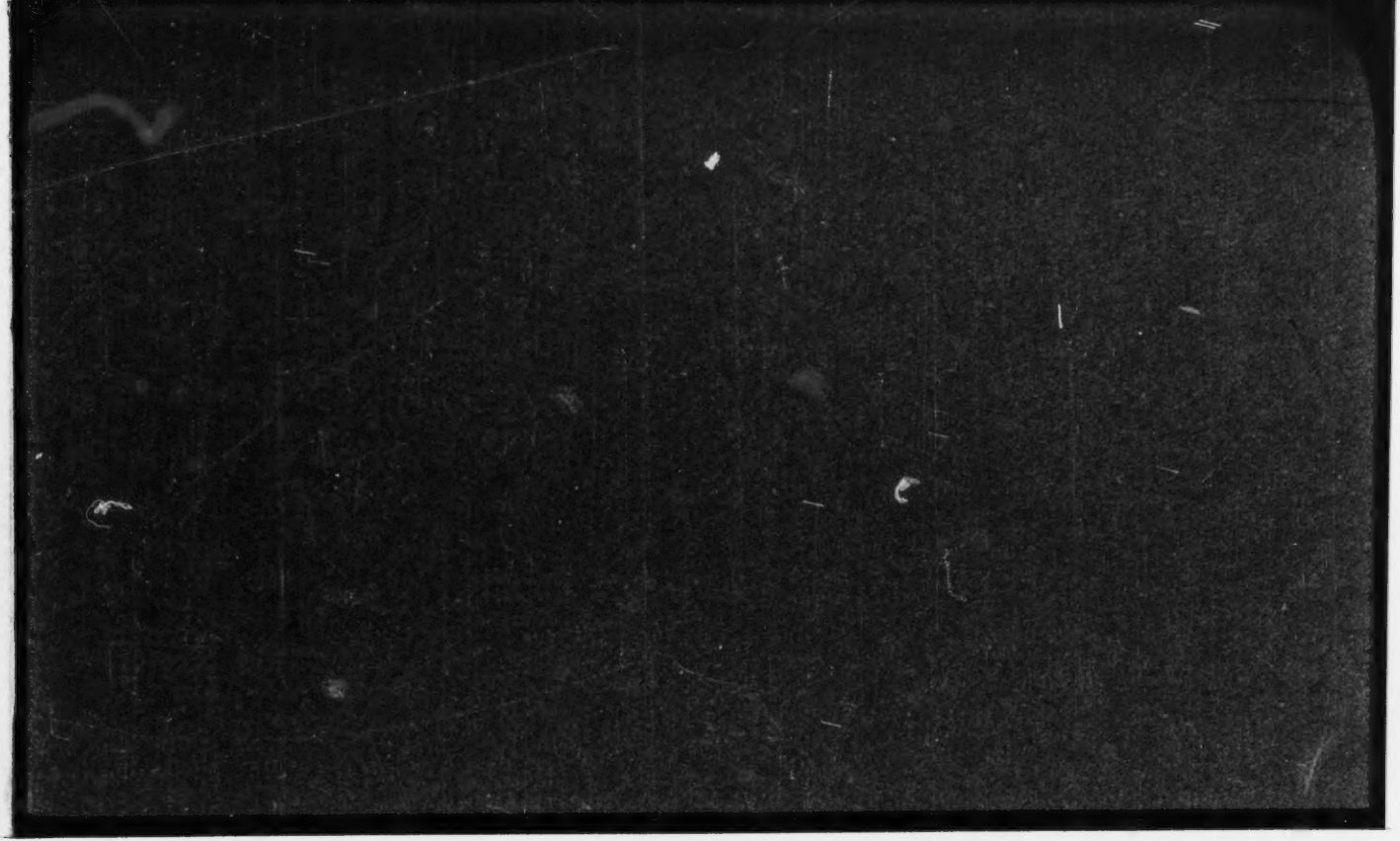

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INDEX.

	Page
STATEMENT	1
POINTS AND AUTHORITIES	4
ARGUMENT:	
I. Evidence Supports Master's Findings	6
Master's Findings of Fact:	
Finding No. 3	6
Finding No. 5	6
Finding No. 6	6
Finding No. 7	7
Finding No. 8	7
Finding No. 9	7
Finding No. 10	8
Finding No. 11	8
Master's Conclusions of Law:	
Conclusion No. 1	9
Conclusion No. 2	9
Conclusion No. 3	9
Conclusion No. 6	10
Master's Recommendation for a Decree	10
A. Land Formed as Island	11
Witnesses:	
Howell E. Geiger	13
Pardee Dyer	14
Clara Dyer	14
Nettie Martin	14
George Pridgeon	14
Esta Surles	14
William Davis	14
Kenneth Brownlee	15
Judge Ryan	15
John H. Peret	15
Clara Dyer	15
Raymond Elmer Simpson	15
Charles Baskins	15
John H. Simpson	15
Isaac Muse	16
C. B. Caton	16
William Prusman	16
Louis F. Stalcup	16
Dave Barbour	16
R. L. Greene	16
Carl Harrison	17
Clarence Harper	17

Page

Bryan Hudgins 17
Clay Hudgins 17
Ed McCoy 17
Avon H. Murray 18
John Guyer 18
Ralph Dyer 18
Harvey H. Hall 18
William Metcalf 18
Verde Harrison 19
Raymond Dyer 19
John Frazier 19
Clate Schaeffer 19
W. L. Moore 19

B. Divided Flow and Ice Jams 21

II. Presumption and Burden of Proof 27

III. Weight and Value of Master's Findings 30

Conclusion 33

INDEX OF CASES AND AUTHORITIES

Cases: Page

Callahan v. Meyers, 128 U. S. 617, 32 L. Ed. 547 31
City of Cape Girardeau v. Hunze, 314 Mo. 438, 284 S. W. 471, 47 A. L. R. 25 27
Commissioners of Land Office of State of Oklahoma v. United States, 270 Fed. 110 24
Davis v. Anderson-Tully Co., 252 Fed. 681 ..... 20, 24
Davis v. Schwartz, 155 U. S. 631, 39 L. Ed. 289, l. c. 293 32
Girard Life Ins. Annuity and Trust Co. v. Cooper, 162 U. S. 529, 40 L. Ed. 1062 31
In re Paul, 14 Fed. (2d) 702 27
New Orleans v. U. S., 10 Pet. 662, 9 L. Ed. 573 23
Oklahoma v. Texas, 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. 428 28
State of Missouri v. State of Nebraska, 196 U. S. 23, 49 L. Ed. 372 23
Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664 31

Authorities:

45 Am. Jur., p. 568, Sec. 37 32
22 C. J. 86 27
11 C. J. S., page 698, Sec. 104 27

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vs.
THE STATE OF MISSOURI, *Respondent.*

RESPONDENT'S BRIEF IN REPLY TO COMPLAINANT'S BRIEF IN RE EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER.

STATEMENT.

The Respondent does not desire to burden the Court with the repetition of matters contained in the Special Master's Report and in the original briefs of the parties on file herein, but makes the following additional statement:

This case is a boundary line dispute between the Complainant, the State of Kansas, and the Respondent, the State of Missouri. It arose by the Complainant, State of Kansas, filing in this Court its complaint in which it alleged that the Missouri River was a part of the common boundary line between western Missouri and eastern Kansas, and that the river throughout the years has changed its location from its position at the time Kansas was admitted into the Union and that as a result the boundary line between the two states has shifted from its original position, and

ask for a determination by this Court of the present true boundary line between the Complainant and the Respondent along the course of the river. The Respondent filed its answer to the Complainant's complaint, in which it set up its claim as to the proper boundary line along the river between the states and joined with the Complainant in asking for a determination of the true boundary line.

After the case was at issue, Honorable Samuel L. Wilson of Lexington, Kentucky, was appointed Special Master to hear the evidence, make his findings of fact and conclusions of law and to recommend a decree. By stipulation between the Complainant and Respondent, the boundary line between the states between the north boundary of Kansas where it joins Missouri and Kansas City, Missouri, was agreed upon except as to the area known as Forbes Bend. The true boundary line in this area being in dispute, evidence on this issue was presented by the Complainant and the Respondent, and the Special Master made his findings of fact thereon in favor of the Respondent and gave his conclusions of law thereon and recommended a decree fixing the boundary between the states in this area as the middle of the main navigable channel of the Missouri River as it flowed on May 27, 1940. The Complainant excepted to the Master's findings on this area and issue and it is upon these exceptions that the matter is now before this Court.

As to this issue it is the Complainant's theory that though the main navigable channel of the Missouri River for many years flowed along the Kansas bluffs, that the River after the year 1900, by erosion and accretion, moved in a northerly and easterly direction to a point in Holt County, Missouri, near the Burlington Railroad tracks and built up large accretions to the Kansas shore, and thereafter by reason of certain ice jams alleged to have occurred in 1917 and 1918 and in 1928 and 1929, an avulsion occurred causing the river to cut a channel across the accretion and to again return toward and in the vicinity of the Kansas bluffs where it now flows, and that the present boundary

line between the states in this area remains near the Burlington Railroad tracks, as more particularly described in the pleadings and record herein.

The Respondent's position is that the Forbes Bend area in dispute herein came into existence as an island which was formed on the Missouri side of the main navigable channel of the Missouri River and not as accretions to the Kansas shore, and that the disputed area is under the jurisdiction of the Respondent and that if there were ice jams, as contended by the Complainant, that they had no avulsive effect on the river for the reason that at the time of the alleged ice jams the main navigable channel of the Missouri River was already in the vicinity of the Kansas bluffs where the river now flows.

POINTS AND AUTHORITIES.

I.

THERE IS SUFFICIENT SUBSTANTIAL EVIDENCE TO SUPPORT THE SPECIAL MASTER'S FINDINGS OF FACT NUMBERED 3, 5, 6, 7, 8, 9, 10 AND 11; THE CONCLUSIONS OF LAW NUMBERED 1, 2, 3 AND 6; AND HIS RECOMMENDATIONS FOR A DECREE RELATING TO THAT PORTION OF THE MISSOURI RIVER AT FORBES BEND AS DESCRIBED ON PAGE 100 OF HIS REPORT.

A.

There was sufficient substantial evidence to support special master's finding that the land in question formed as an island.

Davis v. Anderson-Tully Co., 252 Fed. 681;
Commissioners of Land Office of State of Oklahoma v. United States, 270 Fed. 110.

B.

The evidence in this record discloses that the flow of the river was divided long prior to the alleged ice jam of 1917-18 and 1928-29-30, and that the alleged ice jams had no avulsive effect on the river and did not change the course of the main navigable channel of the river from the Missouri branch to the Kansas branch of the river.

State of Missouri v. State of Nebraska, 196 U. S. 23, 49 L. Ed. 372;
New Orleans v. U. S. 10 Pet. 662, 9 L. Ed. 573;
Davis v. Anderson-Tully Co., 252 Fed. 681;
Commissioners of Land Office of State of Oklahoma v. U. S., 270 Fed. 110.

II.

THERE IS A PRESUMPTION IN FAVOR OF A PERMANENCE OF BOUNDARY LINES AND THE BURDEN OF PROOF IS ON THE ONE ALLEGING THAT THE LOCATION OF THE LINE HAS BEEN CHANGED BY THE ACTION OF THE FORCES OF NATURE.

22 C. J. 86;
City of Cape Girardeau v. Hunze, 314 Mo. 438, 284 S. W. 471, 47 A. L. R. 25;
In re Paul, 14 Fed. (2d) 702;
11 C. J. S., page 698, Sec. 104;
Oklahoma v. Texas, 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. 428.

III.

THE CONCLUSIONS OF THE MASTER IN MATTERS OF FACT HAVE EVERY PRESUMPTION IN THEIR FAVOR, AND ARE NOT TO BE SET ASIDE OR MODIFIED, UNLESS THERE CLEARLY APPEARS TO HAVE BEEN ERROR OR MISTAKE ON HIS PART AND, ON CONFLICTING EVIDENCE, ARE UNASSAILABLE WHEN CONSISTENT WITH THE EVIDENCE.

Callahan v. Meyers, 128 U. S. 617, 32 L. Ed. 547;
Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664;
Girard Life Ins. Annuity and Trust Co. v. Cooper, 162 U. S. 529, 40 L. Ed. 1062.
Davis v. Schwartz, 155 U. S. 631, 39 L. Ed. 289, l. c. 293;
45 Am. Jur., p. 568, Sec. 37.

ARGUMENT.

I.

THERE IS SUFFICIENT SUBSTANTIAL EVIDENCE TO SUPPORT THE SPECIAL MASTER'S FINDINGS OF FACT NUMBERED 3, 5, 6, 7, 8, 9, 10 AND 11; THE CONCLUSIONS OF LAW NUMBERED 1, 2, 3 AND 6; AND HIS RECOMMENDATIONS FOR A DECREE RELATING TO THAT PORTION OF THE MISSOURI RIVER AT FORBES BEND AS DESCRIBED ON PAGE 100 OF HIS REPORT.

The Special Master's findings of fact numbered 3, 5, 6, 7, 8, 9, 10 and 11 are as follows (M. R. 91-94):

> "3. That the Missouri River is and, at all times material herein, has been a navigable stream along that part of its course forming a common boundary between the States of Missouri and Kansas, and the true boundary should and does coincide with the thread of the stream or middle line of its main navigable channel as same now flows, except where it is agreed and stipulated by the parties that such true boundary line departs from the present bed and channel of the river;"

> "5. That, for a period of about 40 years, from January 29, 1861, the date of the admission of the State of Kansas into the Union, down to about the year 1901, or somewhat later, the main channel of the Missouri River in Forbes Bend flowed along and next or near to the foot of the high ground or bluffs on the right or Kansas side of the stream;

> "6. That, beginning at sometime between 1900 and 1907, the water in the river began to veer away

from its former main channel next to the Kansas Bluffs and to cut into and erode the banks on the left or Missouri side of the river, and as this change in its flow progressed three things developed, viz. (1) some gradual accretion to the fast or solid bank on the right or Kansas side of the stream, (2) the emergence of a large sand bar or island in the bed of the river on the Missouri side of the original main channel, built up in part from the bottom and in part enlarged by accretion, and (3) the formation of a split or double channel of the river through most of Forbes Bend;

"7. That any ice jams occurring at or near or between Mileage Stations 510 and 515 in Forbes Bend in 1917 or 1918 or 1927, 1928 or 1929, may have contributed in some degree to accentuate or accelerate such movements in the river, wayward or otherwise, as were then under way in that locality, but none of said ice jam was at any time sufficient to cause an avulsive change in the river nor do they adequately account for the behavior of the river at the place and during the period of time here in question;

"8. That by nothing in which happened in Forbes Bend from the year 1898 or thereabouts down to the institution of this suit on May 27, 1940, was the main navigable channel of the Missouri River in said bend ever changed from the position it originally occupied next or near to the Kansas bluffs except to the extent that said channel was forced to the north and east toward the left or Missouri side of the river by accretions adhering to the banks on the right or Kansas side and which accreted land remains in existence at the present time;

"9. That the same or virtually the same natural forces which progressively diverted the flow of the river toward the north and east in Forbes Bend until the cut bank on the Missouri side and along the left

bank of the farther branch of the divided channel had by gradual erosion reached within a short distance of the Burlington Railroad tracks, operated in like manner to turn the main volume of water back into its accustomed channel to the south and west in the vicinity of the higher grounds of Kansas;

"10. That if, in utter disregard of all evidence of an intervening island and of a divided flow of the river, it were found to be true that the river moved to its farthest point in a northeasterly direction by the gradual process of accretion, it would nevertheless be true by the weight of the evidence that it returned to its present channel by the very same process. With due regard, however, for what is shown by the evidence of record, it is the deliberate finding of the Special Master that the formation of an island on the Missouri side of the main channel and the consequent or coincident creation of a divided flow or double-pronged channel do not substantiate but effectually negative and repel the claim of Kansas, the Complainant, to the acquisition of territory north and east of the present main river in consequence of its alleged accretion to the Kansas shore;

"11. That the boundary line between the States of Kansas and Missouri in the Forbes Bend area, between Mileage Stations 510 and 515, as numbered according to the 1890 system of surveys and measurements, or from the upper to the lower end of the disputed Forbes Bend area as indicated in 'Stipulation—Part One' and 'Stipulation—Part two,' (Comp.'s Ex. 1-A, File 4, and Comp's. Ex. 123-A, File 4), should be and is a line that follows and coincides with the middle line of the present main navigable channel of the Missouri River in said bend between said two points."

The Special Master's conclusions of law numbered 1, 2, 3 and 6, with reference to the Forbes Bend area, are as follows (M. R. 94-96):

"1. That the claims set forth in Paragraphs VI and VII of Complainant's Bill of Complaint whereby it asserts title to and the right of sovereignty and jurisdiction over certain lands in the Forbes Bend section of the Missouri River, which are now wholly separated from the mainland of Kansas by the present main channel of said river, are not sustained by sufficient evidence but are contrary to the decided weight of the evidence;

"2. That the complainant, the State of Kansas, has no valid claim or title to any land in Forbes Bend beyond and to the north and east of the main channel of the Missouri River as it now flows; and all such claim and alleged right on the part of Complainant should be disallowed; and insofar as the same are asserted in Complainant's Bill any relief thereon in favor of Complainant ought to be denied and the Bill to that extent dismissed;

"3. That the aforesaid lands to the north and east of the Missouri River in the Forbes Bend area, herein claimed by the State of Kansas, rightfully belong to the State of Missouri and are under its sovereignty and subject to its jurisdiction and control; that it is lawfully entitled to their possession, use, and enjoyment, and to exercise complete and unrestricted dominion over them, with such incidental powers as constitutionally attach to or inhere in its self-governing political authority as a State of the Union; and that Respondent's rights of ownership, possession, jurisdiction and sovereignty in, to, and over the territory so in controversy between the parties should be upheld and its title confirmed and quieted against all adverse or hostile claims or pretensions of claim of the Complainant and of all persons claiming or to claim by, through or under it; that Complainant, the State of Kansas, should be perpetually restrained and enjoined from disturbing or molesting Respondent, the State

of Missouri, its civil or political subdivisions, public officials, and other inhabitants in the possession and enjoyment of the aforesaid lands and from interfering in any way with the exercise by Respondent of full and untrammeled jurisdiction and control over said territory;"

"6. That a decree in pursuance of and in harmony with the foregoing findings of fact and conclusions of law should be granted."

The Special Master's recommendation for a decree relating to the Forbes Bend area, based on the foregoing findings of fact and conclusions of law, is as follows (M. R. 100):

"Thence from the place where the Missouri River intersects the West line of Section Twenty-Eight, Township Fifty-Nine north, Range Thirty-Eight West, Holt County, Missouri, on down the course or channel of the said Missouri River, and with the middle line of the main navigable channel of said Missouri River as the same flowed on the 27th day of May 1940, through the section of said river known as Forbes Bend, in a general easterly and southeasterly direction downstream to the lower end of Forbes Bend to a point in the present course or channel of said Missouri River opposite which the left bank of said river intersects the North and South center section line of Section One, Township Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri, and then beginning at said point in the present course or channel of the said Missouri River opposite which point the left bank of the said Missouri River intersects the North and South center section line of Section One, Township Fifty-Eight North, Range Thirty-Eight West, in Holt County, Missouri. * * * * * * * * *"

A.

There was sufficient substantial evidence to support special master's finding that the land in question formed as an island.

The Special Master, after reviewing the evidence which included oral testimony and documentary exhibits, on pages 78, 79 and 80 of his report made this observation:

> "But even if it were true that at some time and for some appreciable length of time between the outside limits marking the period here under consideration the main navigable and navigated channel in Forbes Bend followed in general the left erosion bank on the Missouri side of the river, yet this fact by itself is not enough to settle the question of boundary at that place between the two States. To this conclusion we have been irresistibly driven by a number of considerations which we shall proceed to state.
>
> "The evidence as a whole falls short of showing that the main river moved gradually, by a slow and imperceptible process of coincident erosion and accretion, from its original channel next or near to the base of the Kansas bluffs or foot-hills, for two or three miles all the way north and east across the intervening bottomlands of Missouri to what is described in the record as the left bank erosion line, which, at the farthest reach of its arc, approached to within a quarter of a mile or so of the Burlington Railroad tracks. • • • • • • • • If it is permissible for Complainant to rely on the firmly settled dotrine of accretion to justify its claim to these bottom lands in Missouri, it would seem equally allowable for Respondent to do the same in vindication of its asserted right to a reclamation of the same lands. The process, more or less obscure, by which the waters of the roving river reached the farthest erosion bank to the north and east, would seem to have been precisely the process by which they returned to the main channel where they are found

today. But, as already suggested, the law of simple accretion does not provide the key to the vagaries of this unorthodox and unpredictable river; and even less so does the ordinary law of avulsion.

"For a situation such as that disclosed by the record where, instead of a solid, unbroken addition to the receding mainland to the south and west, an island is brought into being in the progress of the erosion of the left bank and only a fraction of the resulting accretions attach to the right bank, leaving the residue to help form the newly created island, it is necessary, as we have said, to discover some modification of the normal law of accretion. One of the things which gives us pause is the fact, convincingly demonstrated by the evidence, that, even before accretions began to show themselves along the Kansas bank of the river, one or more sand bars, eventually rising to the level and dignity of an island, began to form in the bed of the river. • • • • • • • • • • • • • • • As a natural consequence of the emergence and existence of a giant sand bar or island in mid-stream, the proof shows that for a number of years the Missouri River in Forbes Bend flowed in a divided channel or, as otherwise expressed, in two channels. It was, in fact, no doubt due to the rise of this formidable sand bar, which soon attained the dimensions of a fair sized island, that accretions began to form and take hold on the right bank of the original single channel next to the Kansas bluff. • • • • • • • • • • •

"With these three primary and fundamental facts before us, viz., (1) the location and persistence in that location of the original channel, (2) the presence of an island in midstream, and (3) two separate channels or a split channel and a divided flow of the river, attention may be given to certain applicable legal principles which seem to point the way to a correct solution of the problem in hand."

The Complainant's theory of what took place in this area with respect to the river during the period from 1898 to 1923 was that at the beginning of this period the main channel of the river flowed along and close to the Kansas bluffs and that during that period the river gradually eroded the Missouri bank and accreted to the Kansas bank until the channel was within a quarter of a mile or so of the Burlington Railroad tracks on the Missouri side. It also claims that by avulsion the main channel of the river was changed back to where it is now located, but that the boundary line remained at or near the Burlington tracks to which location the river had moved by erosion and accretion.

The Special Master in arriving at his conclusions in this case has found that there was an island formation in the river in the Forbes Bend location during that period of time and that this island or bar formed on the Missouri side of the principal channel of the river; this land, together with any accretions thereto, continued to be Missouri territory even though the main channel of the river passed around and on to the Missouri side of that island. The complainant contended that the Special Master erred in this finding and conclusion because there was no evidence of such island or bar formation, that all of the land which formed in this area was accretion to Kansas territory, formed as a bar to the Kansas shore and was therefore within the jurisdiction of Kansas.

In consideration of the testimony and the exhibits offered in this case the Special Master reviewed the testimony of some fifty witnesses. The Respondent submits that the evidence discussed by the Special Master in his report is amply sufficient to support his findings and conclusions on the question of the island formation. However, for convenience of the Court, we would like to call the Court's attention to some parts of testimony which we feel are particularly important in the determination of this controversy.

Complainant's witness HOWELL E. GEIGER (Tr. I, 112), referring to the Engineer's Map July 23, 1923 (Comp.

Ex. 46, File 5, filed Tr. I, 99) stated that there was superimposed on this map in 1890 river bank lines, 1890 river mileage "and also an island." This witness again referred to this island of 1890 (Tr. I, 118, 119, 126). This would indicate that there was an island at this location even as far back as the 1890 map.

Complainant's witness PARDEE DYER (Tr. I, 198) lived adjacent to this area since 1892 (Tr. I, 206-7) and testified that before the ice jam of 1917 there was one or two channels there through which the water flowed. He further stated that in the summer time when the water got up there were deep channels, almost rivers, but in the fall of the year they would not be very deep.

Complainant's witness CLARA DYER stated that in 1914 the river "run on the Kansas side" (Tr. I, 234).

Complainant's witness NETTE MARTIN (Tr. I, 251), who was 73 years old, testified that the main channel was on the Kansas side and that the river never moved away from the Kansas bluffs. She testified that there were two channels of the river.

Complainant's witness GEORGE PRIDGEON (Tr. I, 262-263) testified that the river seemed to form bar land between the years 1900 and 1913 and that while the river moved towards the Missouri side there were still sloughs through there.

Complainant's witness ESTA SURLES, who was 65 years old, had lived near Lafayette from 1900 to 1913 or 1914 (Tr. I, 270), testified there was a big bar in there and that the Kansas bank was overflowing and filling up and that they called them "sloughs." She also testified that there was a slough between their house and the barn that you couldn't get across and that this slough had water in it the biggest part of the year (Tr. I, 271).

Complainant's witness WILLIAM DAVIES (Tr. I, 275) was 63 years of age, and testified that he lived in the vicinity of Lafayette in 1902 and that the river at that time was right along the Kansas bluff. This witness also mentioned bars in the river at that time (Tr. I, 276).

Complainant's witness KENNETH BROWNLEE, age 48 years (Tr. I, 284), first visited the vicinity of Lafayette in 1906 and at that time the channel of the river was right along the Kansas bank. He also stated that there was always water along the Kansas branch, that it never would dry up (Tr. I, 294, 295).

Complainant's witness JUDGE RYAN, age 65 years, remembers that there was a divided flow in this vicinity but does not remember whether it was 1917 or 1919 (Tr. I, 311-13).

Complainant's witness JOHN H. PERET, age 62 years, testified (Tr. I, 371) that from 1906 to 1917 the Missouri River in the vicinity of Forbes Bend was cutting back nearly every year, that there were bars formed in the river with sloughs running through them (Tr. I, 374). While this witness also testified that the Baker School House which was one-half mile north and five-eighths of a mile east of the river in 1906, was cut into the river in 1911 or 1912 (Tr. I, 371), which would indicate that there was some channel on that side of the island at that time, yet, the complainant's witness CLARA DYER stated that the principal channel ran on the Kansas side in 1914 (Tr. I, 234).

Complainant's witness RAYMOND ELMER SIMPSON (Tr. I, 466) stated that in 1918 practically all of the river was on the Kansas side, that there was an island there at that time and that the Kansas channel was much the largest. He testified that he noticed a divided channel in 1917 or 1918 and that when he returned from the war practically all of the river was on the Kansas side.

Complainant's witness CHARLES BASKINS (Tr. I, 493) stated that in 1898 or about 1900 the channel of the river scrubbed right along the banks of the river on the Kansas side, that the channel didn't change for several years—until about 1913 or 1914 (Tr. I, 493, 496).

Complainant's witness JOHN H. SIMPSON, who was 79 years of age, testified that in 1905 the main channel was mostly under the bluff on the Kansas side. He stated that the divided flow began somewhere around 1912 or 1913 (Tr. I, 521).

Complainant's witness ISAAC MUSE, age 58 years, stated that the channel was close to the Kansas bluffs in 1900, that there was an island in the river at that time and water was on both sides of it in 1900 (Tr. I, 544).

Complainant's witness C. B. CATON was acquainted with the river from Wolf Creek to Lafayette in 1914 and that between 1914 and 1921, prior to the time the government put the dikes in, the river was hugging the Kansas side pretty well (Tr. I, 555, 557, 558).

Complainant's witness WILLIAM PRUSMAN (Tr. I, 616) stated that when the river cut into Missouri it threw in a bar out there and that there was a small channel on the other side.

Complainant's witness LOUIS F. STALCUP (Tr. I, 635) stated that there was more than one channel in the river in 1910 or 1911 (Tr. I, 637-638). He stated that at that time you could stand on the Missouri side and see two channels coming down each side of the island. He also stated that this island never disappeared (Tr. I, 640, 645). This witness also stated:

> "I was on this island the other day over there and bought some calves, and I was on the same land that I stood there and watched this island back in 1910" (Tr. I, 646).

The Respondent's witness DAVE BARBOUR, age 64 years, stated that the river had a divided flow beginning about along 1903 and that it continued to flow on both sides of the bar until 1928 or 1929 (Tr. II, 731, 732). He also testified that any time from 1902 on up as long as he had known it, there was plenty of water on the south side of the island (Tr. II, 734). He was pretty sure that the channel had a divided flow in 1914, a little bit on the north side of the island and quite a lot of channel on the south side (Tr. II, 739).

Respondent's witness R. L. GREENE, age 72 years, testified that the river in the Forbes Bend area flows now about where it did in 1900 (Tr. II, 753-754). He told about the sandy bar that became an island and said the river

flowed on both sides of the island. He also made the statement that there was just one river bed (Tr. II, 755, 756). He further stated that he never had known a time when there wasn't a flow of water on the south side, or Kansas side, of the river (Tr. II. 760).

Respondent's witness CARL HARRISON, age 60 years, stated that the river was doing its main cutting in 1914 and that it had a divided flow at that time. He further stated that there was always water and a channel on the Kansas side since 1914 (Tr. II, 768).

Respondent's witness CLARENCE HARPER, age 60 years, stated that there was a divided flow in 1915 and that there was always a substantial flow on the Kansas side (Tr. II, 770). He stated, in describing the flow around the bar "there were two main channels; then there were these chutes that went across there" (Tr. II, 770-774-779).

Respondent's witness BRYAN HUDGINS, age 44 years, testified that in 1903 the river ran close to the Kansas bluffs (Tr. II, 799); that the flow of the river was divided for a period of years and that the island formed at the lower end around 1914; that the flow was divided at that time and there was water on both sides (Tr. II, 805); that there was a substantial flow of water on the Kansas side at the time it was divided; and that there was never any sudden change in the channel and that the island enlarged as the river cut in the land (Tr. II, 808).

Respondent's witness CLAY HUDGINS, 57 years old, stated that his earliest recollection of the divided flow was 1915 (Tr. II, 783).

Respondent's witness ED McCOY testified that when he first knew the river in this locality that it flowed next to the Kansas bluffs, that it commenced to cut in the bottoms in 1915 and cut right up to where the Jamieson's bar is. He spoke of an island being in the river at that time. This witness, in referring to Complainant's Exhibit 46, File 5, spoke of an island or bar in the river in 1923 which was represented on this exhibit. He further stated that there was never a time that he remembers of that there wasn't water on the south side of Jamieson's bar (Tr. II, 816-819).

Respondent's witness AVON H. MURRAY, age 47 years (Tr. II, 827) said that in 1915 the flow of the river was divided and there was a small island out there at that time. He also stated that at all times during his acquaintance with the river that there was always a channel on both sides of the bar (Tr. II, 829-30).

Respondent's witness JOHN GUYER said that the river flowed down on the Kansas side until it began to cut on the Missouri side in about 1910. He stated that the bar was formed there when the river began this cutting on the Missouri side and that during all those years there was always a channel on the Kansas side of this bar. He also stated that there was a divided flow from Wolf River on down from 1910 (Tr. II, 840-41).

Respondent's witness RALPH DYER, age 43 years, first became acquainted with the river in 1909. According to his testimony the river did the worst cutting on the Missouri side from 1914 to 1923 and formed the Jamieson bar. He stated that the river was divided about 1913 or 1914 and that there seemed to be an island out there in the center of the river along about Lafayette and that this island split the channel (Tr. II, 843). He stated that the Missouri channel began to fill up in 1923 (Tr. II, 844). He also stated that it took about ten years for the river to fill back (Tr. II, 846).

Respondent's witness HARVEY H. HALL, age 48 years, said that when he first knew the river in 1916 it was on the Kansas side, that the flow of the river was divided by an island in the middle of the river (Tr. II, 862-63). He further stated that there was no sudden change in the flow of the river in 1917 (Tr. II, 866).

Respondent's witness WILLIAM METCALF, who was 65 years of age, first became acquainted with the Forbes Bend locality in 1886 and that at that time the river was mostly on the Kansas side and there was an island up there then. He further stated that there was a divided flow of the river in 1916 and that there was no sudden change in the channel in 1917 (Tr. II, 875).

Respondent's witness VERDE HARRISON testified that there was a divided channel in 1914 and the river was on the Kansas side at that time. He further stated that he noticed no sudden change in the river between 1914 and 1921 (Tr. II, 892-93).

Respondent's witness RAYMOND DYER, age 39 years, stated that the river in 1914 was pretty much on the Kansas side, that in the years 1917 to 1919 he observed a divided flow and that there was always a channel on the Kansas side and he never noticed any sudden change in the river (Tr. II, 898-900). He described the island as containing about twenty-five or twenty-six hundred acres—this is the land in question in this suit (Tr. II, 904).

Respondent's witness JOHN FRAZIER, age 71 years, stated that he had lived in the vicinity of Wolf River since 1875. He described the formation of the bar below the mouth of Wolf River and the Schaeffer bar in particular, which was slightly upstream from the mouth of Wolf River (Tr. II, 928-35).

Respondent's witness CLATE SCHAEFFER, age 51 years, was born in that vicinity and lived there all of his life. He stated that at the Forbes Bend location the river always had a divided flow till it cut their place in. He further testified that in 1900 the main channel was on the Kansas side, that there was a chute on the Missouri side (Tr. II, 936). This witness further testified that he never knew the time when there was not water on the Kansas side of the island (Tr. II, 942).

Respondent's witness W. L. MOORE, age 53 years, became acquainted with the river between 1906 and 1908; he hunted on the river from 1908 to 1912 and bought apples; he stated that during those years the river was over by the Kansas bluff and that he never knew a time when there wasn't a channel on the Kansas side. He stated that the river had a divided flow in 1917 and 1918 (Tr. II, 954-62).

The Special Master in his Report, at page 31, states that the older maps or plats offered in evidence: Respondent's Exhibit 25, File 2; Respondent's Exhibit 26, File 2; Respondent's Exhibit 4, File 3; Complainant's Exhibits 66

and 67, File 2; show that there were some sloughs or chutes and sand bars or islands in this Forbes Bend area at the time these exhibits were made and that these suggest the present tendency towards accumulation of sand in the middle of the river or shoal bars or islands in this area. According to the Complainant's theory there was no island formation in the Forbes Bend area between the periods of 1898 to 1917 and 1918 but that all of the land formed in there was bar land which had accreted to the Kansas shore line or had formed as an island on the Kansas side of the main channel.

Complainant's Exhibit 46, File 5, when referred to by Howell E. Geiger (Tr. I, 112), shows that there was superimposed on this exhibit, which was dated in July, 1923, the 1890 river bank lines, and this exhibit also shows the existence of an island, according to witness Geiger (Tr. I, 118, 119, 126).

The Complainant's theory throughout the trial of this case was that the land in controversy formed as an accretion to the Kansas shore line and that it was later cut off by an avulsion of the river which caused the divided flow of the river, forming what is now the island in controversy. Under the rules of law, if this is true, the land in controversy would be Kansas territory. However, the theory of the Respondent, and the theory upon which the Special Master based his findings, was that the land formed as an island or bar in the bed of the river on the Missouri side of the principal channel and regardless of the fact that the principal channel of the river thereafter later came around and beyond this tract of land to the north and east and on the Missouri side of this land, it still remained Missouri territory. This statement is based upon the principle of law applied by both parties and announced in *Davis v. Anderson-Tully Co.*, 252 Fed. 681; *Commissioners of Land Office of State of Oklahoma v. United States*, 270 Fed. 110, and two cases cited in the Special Master's Report, pages 80 to 87.

The Special Master in considering this case had before him witnesses offered by both parties and certain exhibits.

He based his finding that there was an island formation upon evidence of witnesses for both the Complainant and the Respondent that prior to 1917, the date of the alleged avulsion, that there was a divided flow of the river at the Forbes Bend area. He also had before him statements of witnesses that there was an island in this locality, and on the Missouri side of the main channel, prior to 1917; that there was a flow of water next to the Kansas bluffs. Maps and exhibits before the Special Master reveal that there were island formations in this area, and as far back as 1890 there was an island in this locality. While there is some evidence in the record which does not support the conclusion that this land in controversy is an island formation, yet, inasmuch as the Special Master is the trier of the facts, and that since he did have substantial testimony before him supporting the fact that this is an island formation, the Respondent submits that the Special Master's findings that this land is an island formation, should be affirmed and adopted by this Court.

B.

The evidence in this record discloses that the flow of the river was divided long prior to the alleged ice jam of 1917-18 and 1928-29-30, and that the alleged ice jams had no avulsive effect on the river and did not change the course of the main navigable channel of the river from the Missouri branch to the Kansas branch of the river.

It is the position of the complainant that the divided flow in the river was caused by the alleged ice jam of 1917-18, and that there was no divided flow prior thereto. It is the position of the respondent that the divided channel came into existence between 1900 and 1917-18 before the alleged ice jam occurred. The Master, in his report with reference to the divided flow (page 54) says:

> "From the combined testimony of more than fifty witnesses, whose relevant statements have been here abstracted, it is plain enough that there was a bar or island and a divided flow of the river in the Forbes

Bend section at all the times material to this controversy. Considering this oral evidence in the light of the survey and map relating to Forbes Bend, which are in the record, it also appears fairly evident that the entire cycle in the changes in Forbes Bend, which we are concerned here, had run its course within a period of about eighteen years, from about 1900 to 1917,-'18, or from about 1905-'06 to 1923-'24 * * * * *."

The respondent has set out in Sub-Section A a summary of the witnesses who testified that an island was formed in this area in the river between 1900 and 1917-18. The formation of the island necessarily resulted in a dividing of the channel as attested by the foregoing witnesses. It would be repetition to again summarize the testimony of these witnesses that the flow of the river was divided between 1900 and 1917-18. There is no documentary proof in the records to show what took place in the Missouri River between 1898 and 1918. That there was a divided flow in the river is apparent from this record, but the time that the divided flow came into existence and the cause thereof is in dispute. The complainant takes the position that there was a divided flow only after 1917-18, and that the flow was divided as a result of an ice jam which occurred in 1917-18. The respondent, however, takes the position that the divided flow of the river came about during the period of 1900 to 1917-18, and prior to the occurrence of any alleged ice jam of 1917-18. The respondent submits that the oral testimony set out in Sub-Section A supports the respondent's position and furnishes sufficient substantial evidence to support the Master's findings on this issue.

There is some evidence on the part of the complainant that an ice jam formed in the Forbes Bend area in 1917-18. A few witnesses for the complainant testified in that respect. Many of the witnesses for the complainant, who claimed to have a knowledge of the river during this period, testified that they knew nothing of any ice jam. Many of the witnesses for the respondent testified to the same effect. The witnesses for the complainant who testified that there

was an ice jam in 1917-18 differs materially as to the size of the ice jam and its duration. This evidence falls far short of being convincing that an ice jam of sufficient size and duration existed in 1917-18 to cause a sudden shifting of the channel across the accretions in a new channel.

Even assuming the existence of the ice jam of 1917-18 as alleged by the complainant, it is apparent that it had no avulsive effect on the river. The weight of the evidence herein discloses that the main navigable channel of the river, during the period prior to 1917, was along the Kansas bluffs. The complainant offered its exhibit 46 (File 5—(1923), Transcript 1, 91) to show that in 1923 the main navigable channel of the Missouri River was in the Missouri branch thereof. It offered an exhibit for a few years subsequent to that date to establish that the main navigable channel of the Missouri River was in the Missouri branch. If the main navigable branch of the Missouri River was in the Missouri branch in the year 1923 and following, as contended by the complainant, then it is evident that the ice jam of 1917-18 did not cause the main navigable channel of the Missouri River to cut across these accretions. Since the ice jam of 1917-18 did not cause the main navigable channel of the Missouri River to suddenly shift from the Missouri branch and cut across these accretions, it had no avulsive effect upon the river.

If the main navigable channel of the Missouri River was, however, in the Missouri branch, as contended by the complainant, and returned in the late 20's to the Kansas branch, it is evident from this record that its return was not suddenly, or by avulsion, but that it came back gradually throughout the period of years. For there to be an avulsion, the change of the river must be sudden and abrupt, and an avulsive change cannot extend over a period of several years.

The rule that an avulsive change means a sudden abandonment of its old channel and the seeking of a new channel is amply supported by the decisions of this court. See *State of Missouri v. State of Nebraska*, 196 U. S. 23, 49 L. Ed. 372; *New Orleans v. U. S.* 10 *Pet.*, 662, 9 L. Ed. 573.

Many other cases from this court, and other jurisdictions, can be cited in support of this proposition.

The complainant, therefore, cannot rely under this record on the theory of avulsion. It seeks also to bring its case under the exception announced in the case of *Davis v. Anderson-Tully Co.*, 252 Federal 681; *Commissioners of Land Office of State of Oklahoma v. U. S.*, 270 Federal 110, where it is held that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them and running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation.

Assuming, for the purpose of argument, that the ice jam occurred as contended by the complainant, it is obvious that the ice jam did not create the result for which the complainant contends. If there was a divided flow in the river, which respondent claims is proved beyond doubt, prior to the formation of the ice jam, and if the main navigable channel of the Missouri River, prior to the formation of the ice jam, flowed in the vicinity of the Kansas bluffs as is disclosed by the evidence herein, then the ice jam, if it had any result whatever, had the result of transferring the main channel of the Missouri River from the Kansas channel to the Missouri channel, because the complainant contends that its evidence shows that the main navigable channel of the Missouri River in 1923 and subsequent years flowed through the Missouri branch. In other words, under the evidence in this record if the ice jam had any effect upon the Missouri River it had the effect of causing

the main navigable channel of the Missouri River to change its course from the Kansas branch to the Missouri branch. This proposition is very clearly analyzed and stated by the Master in his report (page 55) as follows:

> "That there was such an ice jam there is no reason to doubt, but that it caused such an avulsion as is claimed for it by complainant is far from clear. Certain natural conditions and the characteristic behavior of the river did unquestionably bring about a progressive diversion in the flow of the river and the emergence of a large bar or island in Forbes Bend, and these developments may have been stimulated or accelerated by this ice jam of 1917 or 1918. But the evidence completely fails to show that this ice jam or any other physical force or factor operating in 1917 or 1918, had the effect or tendency of directing the flow from Missouri to Kansas. Unless we grievously misapprehend the evidence, this ice jam of 1917, if it had any direct influence at all on the flow of the river, quickened and aggravated the inroads of the river into Missouri instead of throwing the greater volume of water more and more toward Kansas. In other words, if there were any avulsive changes of the river during the period in question, those changes, in the opinion of the Special Master, were adverse to the interests of Missouri rather than to those of Kansas. (See Wiltse v. Bolton, 132 Neb. 354; 272 N. W. 197)."

The complainant also contends that a subsequent ice jam of 1928 or 1929 occurring in conjunction with the ice jam of 1917-18 accounts for the fact that today the main navigable channel of the Missouri River flows where it does; that is, in the vicinity of the Kansas bluffs. The respondent submits that the ice jam of 1927, 1928 or 1929 could not have had any avulsive effect upon the river because under this record the main navigable channel of the Missouri River was flowing down the Kansas branch before the ice jam, if any, of 1927, 1928 or 1929 ever occurred, even though it is

assumed that the main navigable channel of the river once flowed through the Missouri branch, which the respondent has always denied and still denies. This proposition is aptly put by the Master on page 56, where he says:

> "The ice jam of 1927, 1928, or 1929, while more amply attested than that of 1917 or 1918, does not, in our opinion, materially affect the problem for two reasons, one that the main channel prior thereto was already on the Kansas side of the intervening island, and, in any event, this ice jam seems to have had no avulsive effect on the flow of the water down the Missouri channel. It may have reduced the flow somewhat and have set in motion or promoted a gradual subsidence of that flow, with a like gradual filling up of the shrinking Missouri channel, but it cannot be said that it caused any avulsive changes whatever. Evidence to that effect is nebulous if not nonexistent. The variations in the direction and depth of the flow of the river came from causes more subtle and yet more potent than a single solitary ice jam of comparatively brief duration and of wholly uncertain extent. * * *."

The respondent submits, therefore, that the alleged ice jam of 1917-18 did not cause an avulsion because there was not a sudden and abrupt shifting of the channel of the river; if the alleged ice jam had any effect whatever, it caused the main navigable channel of the Missouri River, which had throughout years flowed in the vicinity of the Kansas bluffs and in the Kansas branch of the river, to shift over to the Missouri branch of the river; the ice jams of 1927, 1928 or 1929 had no avulsive effect upon the river because at the time of alleged ice jam the main navigable channel of the Missouri River flowed down the Kansas branch of the river. The Master's finding in this respect is amply supported by the facts and law, and should be confirmed.

II.

THERE IS A PRESUMPTION IN FAVOR OF A PERMANENCE OF BOUNDARY LINES AND THE BURDEN OF PROOF IS ON THE ONE ALLEGING THAT THE LOCATION OF THE LINE HAS BEEN CHANGED BY THE ACTION OF THE FORCES OF NATURE.

The Special Master in his report, at pages 64-65, made this statement with reference to the foregoing presumption:

> "To begin with, it is admitted by counsel for complainant that for nearly forty years, if not longer, the Missouri River, in Forbes Bend, flowed continuously and without interruption next or close to the Kansas bluffs. (Tr. I, 176; Tr. III, 1459, 1460.) The main navigable channel during the whole of this period, from 1861 to 1900, or thereabouts, was on the Kansas side of the river. There were no islands or bars of consequence on that side of the river—indeed, there was no room for such bars or islands between the river and the bluffs. In the absence of positive evidence to the contrary, the legal presumption is that such conditions in the river remained stationary or substantially so."

In 22 *C. J.* 86, the principle is announced as follows:

> "Proof of the existence of a fact or condition at a particular time within reasonable limits gives rise to the inference that it continues to exist, in the absence of proof to the contrary."

This principle has been applied in the case of *City of Cape Girardeau v. Hunze*, 314 Mo. 438, 284 S. W. 471, 47 A. L. R. 25; *In re Paul*, 14 Fed. (2) 703. Also, in 11 C. J. S., under the topic of "boundaries," page 698, Sec. 104, the principle that the burden is on the complainant to show a change of boundary, is stated as follows:

> "The burden of establishing a change in the boundary of property is on the claimant, and so the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature."

In the case of *Oklahoma v. Texas*, 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. 428, the principle was applied in the following language:

> "Common experience suggests that there probably have been changes in this stretch of the Red River since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old."

It may be that the Complainant has shown that there was water flowing through the North branch, or Missouri channel of the river, but its proof falls short by such a showing unless it establishes by a preponderance of the evidence that while the water was flowing through the Missouri, or North chute, that it became the main channel of the Missouri River.

The record in this case discloses that the Respondent's witnesses testified that the main channel of the Missouri River, from back in the '80's until up beyond 1900, flowed along and hugged the Kansas bluffs. Similar testimony on the part of the Complainant's witnesses establishes the fact that the main channel of the Missouri River flowed along and hugged the Kansas bluffs of the Missouri River from the beginning until about 1906. All the exhibits introduced in evidence showing the location of the Missouri River from the time of the admission of Kansas into the Union up to and including 1918, show that the main channel of the Missouri River ran along the Kansas bluffs. Complainant's Exhibit 46, under date of 1923, while it shows two flows on the river, disclosed that the Kansas channel was as wide and as deep as the North, or Missouri, channel and that it was much shorter and, therefore, the practical

channel. The witnesses for Respondent testified that in 1923, and for many years prior thereto, the Kansas channel had been used by boats as the only navigable channel in the Missouri River.

The Complainant admits in its brief that there is no documentary evidence from 1898 until 1918 showing the location of the main channel of the Missouri River. Such lack of evidence does not help the Complainant's case, nor help it meet the burden imposed upon it. The Complainant concedes that the main channel of the Missouri River was along the Kansas bluff until after 1900 and its Exhibit 46, under date of 1923, shows a navigable channel in the Kansas branch of the river. It must be presumed, therefore, that between the years 1898 and 1918, that the main channel of the Missouri River was on the Kansas side and not on the Missouri side. In any event, the Complainant has not proved that between 1898 and 1923 the main channel of the Missouri River was over in Missouri near the Burlington tracks as they contend.

The Complainant contends, however, that Complainant's Exhibit 47, under date of 1926, and Complainant's Exhibit 102, under date of 1928, and Complainant's Exhibit 133, under date of 1928, show that the main channel of the Missouri River was on the Missouri side. These exhibits do show water on the Missouri side, and they also show water of varying width. The production of exhibits, however, showing widths of water does not prove the location of the main channel of the river. None of these exhibits has any soundings to prove the depth of the river and for one to conclude from an examination of those exhibits that the main channel of the Missouri River has shifted from the Kansas branch, where it has heretofore been established, to the Missouri branch, opens the field to guess-work and conjecture.

Complainant's Exhibit 46 is the only exhibit in evidence in this case which shows any soundings and would give the Court any idea as to where a channel of the river was located after the flow of the river was divided and that exhibit does not support Complainant's contention that

the main channel was in the Northern, or Missouri, branch of the river. The exhibits offered by Complainant showing the river at subsequent dates are of no probative value in determining where the main channel is located. Testimony of lay witnesses on the part of the Complainant as to how wide the river was, in the Missouri channel or in the Kansas channel, has no probative value in determining where the main channel is located. None of the Complainant's witnesses attempted to testify as to the depth of the river throughout its course in either branch in order to fix the main channel of the river.

Both Complainant's and Respondent's witnesses testified that the main channel of the Missouri River was near the Kansas bluffs until some time after the year 1900. The Respondent's witnesses testified that the main channel of the Missouri River continued to remain near the Kansas side from that date up until the time the War Department began to shove it slightly away from the Kansas side to its present location. Respondent insists that the above exhibits offered by the Complainant, and its oral testimony, are not of sufficient probative value to move the main channel of the Missouri River from the place where it has been definitely fixed by testimony offered by the Complainant and the Respondent. The Complainant has failed to prove, by clear and convincing evidence, that the main channel of the Missouri River ever was in the Northern, or Missouri, side of the river, and has failed to introduce sufficient evidence so show that the main channel of the Missouri River ever moved away from its location on the Kansas bluffs, or from the Kansas, or South, channel of the river, after it divided.

III.

THE CONCLUSIONS OF THE MASTER IN MATTERS OF FACT HAVE EVERY PRESUMPTION IN THEIR FAVOR, AND ARE NOT TO BE SET ASIDE OR MODIFIED, UNLESS THERE CLEARLY APPEARS TO HAVE BEEN ERROR OR MISTAKE ON HIS PART AND, ON CONFLICTING EVIDENCE, ARE UNASSAILABLE WHEN CONSISTENT WITH THE EVIDENCE.

The evidence as to what occurred with respect to the actions of the Missouri River in this Forbes Bend area is conflicting. It must necessarily be so because the course and actions of the river from the years 1898 to 1918 must be determined solely from oral testimony by witnesses. Prior to 1898 and subsequent to 1918, this oral testimony is supplemented by documentary evidence. More than fifty witnesses were interrogated as to the course and actions of the Missouri River with reference to this disputed area. The conflict in what these witnesses saw and remembered is to be expected. All of these witnesses did not have the same opportunity to observe the actions of the river and the periods of time in which they were acquainted with the river differed. The fact that these witnesses were not in accord in every detail of their testimony does not tend to destroy the correctness of the Master's findings herein; the credibility of the witness and the weight to be given his testimony was for the Master.

The picture of what happened with respect to this disputed area has to be ascertained by weighing of the testimony of the witnesses as to the material points upon which they testified. While it is not possible to reconcile the statements of all the witnesses who testified herein in this case, any more than it can be done in any case where there is a sharp conflict of fact, it is evident from this record that the Master, after considering all of the relevant testimony, has determined each issue according to the greater weight of the credible testimony. His findings of fact herein are amply supported by sufficient substantial evidence. The fact that some witnesses may have testified to facts inconsistent with the Master's findings, does not destroy the soundness of his findings based upon the entire record.

The general rule is that the conclusions of the Master in matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part. *Callahan v. Meyers*, 128 U. S. 617, 32 L. Ed. 547; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Girard Life Ins. Annuity and Trust Co., v. Cooper*, 162 U. S. 529, 40 L. Ed. 1062.

The rule is further stated that a referee's findings of fact are not absolutely conclusive, as where there is no testimony tending to support them; but so far as they depend on conflicting testimony, or on the credibility of witnesses, or so far as there is any testimony consistent with the findings, they must be treated as unassailable. 45 *Am. Jur.*, p. 568, Sec. 37.

The above rule is recognized and followed by this court in *Davis v. Schwartz*, 155 U. S. 631; 39 L. Ed. 289, where it is said at page 293:

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. Wiscart v. Dauchy, 3 U. S. 3 Dall. 321 (1:619); Bond v. Brown, 53 U. S. 12 How. 254 (13:977); Graham v. Bayne, 59 U. S. 18 How. 60, 62 (15:265, 266); Norris v. Jackson, 76 U. S. 9 Wall. 125 (19:608); Mercantile Mut. Ins. Co. v. Folsom, 85 U. S. 18 Wall. 237, 249 (21:827, 833); The Abbottsford v. Johnson, 98 U. S. 440 (25:168)."

A reading of this record will disclose that there is a conflict in the evidence; the Master's report is supported by sufficient substantial evidence and is consistent with the evidence and under the foregoing rule his findings must be treated as unassailable and his report herein confirmed.

CONCLUSION.

Respondent respectfully submits that upon the record re which contains conflicting testimony, there is sufficient bstantial evidence to support the findings of fact, con- isions of law and recommendations for a decree of the ecial Master, and that the same should be approved and opted by this Court.

Respectfully submitted,

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No. 9, Original

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CHARLES ELMORE CROPLI
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In the Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF KANSAS, Complainant,

vs.

THE STATE OF MISSOURI, Respondent.

Joint Motion of Complainant and Respondent to Modify Decree of June 5, 1944

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25-5521

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF KANSAS, Complainant,

vs.

THE STATE OF MISSOURI, Respondent.

No. 9, Original

Joint Motion of Complainant and Respondent to Modify Decree of June 5, 1944

Come now the State of Kansas, complainant, and the State of Missouri, respondent herein, and do move the court to modify its decree in this cause under date of June 5, 1944, and in support of said motion do state as follows:

(1) That this Court in this cause entered its decree on June 5, 1944, establishing the boundary line between the states of Kansas and Missouri as the middle line of the main navigable channel of the Missouri River and as said river flowed at the time of the filing of the complainant's bill of complaint herein throughout the entire course of said river from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River with the exception of said deviations and departures from the course of the said Mis-

souri River as it then flowed as determined and set out in said decree by metes and bounds descriptions.

(2) That under said decree the State of Kansas retained the sovereignty over certain lands lying on the Missouri side of the center of the channel of said river and the State of Missouri retained the sovereignty over certain lands lying on the Kansas side of the center of the channel of said river.

(3) That the legislature of the State of Kansas duly passed House Bill No. 25 relinquishing to the State of Missouri all sovereignty over all lands lying on the Missouri side of said center of the channel of the Missouri River and the legislature of the State of Missouri duly passed Senate Bill No. 141 relinquishing all sovereignty over all lands lying on the Kansas side of said center of the channel of the Missouri River and both acts provided that the center of the channel of the Missouri River as its flow extended from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kansas or Kaw River shall be that portion of the true and permanent boundary line between the States of Missouri and Kansas subject only to changes which may occur by the natural processes of accretion and reliction and not by avulsion.

(4) That both acts provided that the effective date of the relinquishment of sovereignty over certain lands should be midnight of the effective date of a resolution or Act of Congress approving the respective relinquishment of sovereignty by the States of Missouri and Kansas.

(5) That the Congress of the United States did pass its joint resolution which was approved by the President of the United States on August 3, 1950, approving and ratifying the agreement aforesaid between the States of Missouri and Kansas. Said joint resolution is as follows:

(PUBLIC LAW *637*)
(CHAPTER *519*)

EIGHTY-FIRST CONGRESS OF THE UNITED STATES OF AMERICA AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, one thousand nine hundred and fifty.

JOINT RESOLUTION

Giving the consent of Congress to an agreement between the State of Missouri and the State of Kansas establishing a boundary between said States.

WHEREAS, The General Assembly of the State of Missouri passed an act known and designated as Senate Bill Numbered 141, bearing the signature of James T. Blair, Junior, president of the senate; Ray Hamlin, speaker of the house of representatives; and the signature and approval of Forrest Smith, Governor of Missouri, under date of December 19, 1949; and,

WHEREAS, The Legislature of the State of Kansas passed a similar act known and designated as House Bill Numbered 25, bearing the signatures of Dale M. Bryant, speaker of the house of representatives; Frank L. Hagaman, president of the senate; and the signature and approval of Frank Carlson, Governor of Kansas, under date of February 22, 1949; and

WHEREAS, The said acts provided in substance that upon the ratification of said acts by the Congress of the United States, the center of the channel of the Missouri River, as its flow extends from

its intersection with the fortieth parallel, north latitude, southward to the middle of the mouth of the Kansas or Kaw River, shall be that portion of the true and permanent boundary line between the States of Missouri and Kansas, subject only to changes which may occur by the natural processes of accretion and reliction, but not by avulsion; and

WHEREAS, The said acts of the States of Missouri and Kansas constitute an agreement between said States establishing a boundary line between said States: Therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress is hereby given to such agreement and to the establishment of such boundary, and said acts of the States of Missouri and Kansas are hereby approved.

(Signed) SAM RAYBURN,
Speaker of the House of
Representatives.
(Signed) ALBEN W. BARKLEY,
Vice President of the United States
and President of the Senate.

Approved
Aug. 3, 1950.
(Signed) Harry S. Truman

(6) That the States of Missouri and Kansas and the Congress of the United States have determined that the center of the channel of the Missouri River as its flow extends from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kansas or Kaw River shall be that portion of the true and permanent boundary between the States of Missouri and

Kansas subject only to changes which may occur by the natural processes of accretion and reliction and not by avulsion and that such boundary line is in conflict with this Court's decree which fixes the boundary line by metes and bounds where such boundary deviated and departed from the course of the said Missouri River and that in view of the action of the States of Missouri and Kansas and the Congress of the United States it is no longer necessary for this Court to order the placing of suitable monuments or markers on said boundary line and in order to avoid confusion and to settle the issues between the States of Missouri and Kansas according to their agreement as approved and ratified by the Congress of the United States that this Court's decree in this cause should be modified to conform to the acts of the parties herein as approved and ratified by the joint resolution of Congress aforesaid.

WHEREFORE, your petitioners move that this Court modify its decree of June 5, 1944, heretofore entered in this cause, to conform to the agreement between the States of Missouri and Kansas as approved and ratified by the Congress of the United States and approved by the President of the United States to be effective from midnight of August 3, 1950, by eliminating from said decree the metes and bounds designation where the Court found that the boundary line deviated and departed from the course of the said Missouri River and decreeing that the center of the channel of the Missouri River as its flow extends from its intersection with the 40th parallel, north latitude, southward to the middle of the mouth of the Kansas or Kaw River shall be that portion of the true and permanent boundary line between the States of Missouri and Kansas effective midnight of August 3, 1950, subject only to changes which may occur by the natural processes

of accretion and reliction and not by avulsion and that t
Court eliminate from its decree all reference to the pla
ing of monuments or markers.

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23-5531